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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CELLULAR OF
NORTHWEST OHIO, INC.,
Transferor

and File No. 84622-CL-TC-1-88

C.I.S. OF
BILLINGS, INC.,
Transferee

For Consent to Transfer Control
of the License of Billings Cellular
Corporation in the Domestic Public
Cellular Radio Service for Station
KNKA670 in Billings, Montana

ORDER

Adopted: February 4, 1991; Released: February 13, 1991

By the Commission:

1. The above captioned application for transfer of control was granted on December 29, 1988. Public Notice, Report No. CL-89-61, January 11, 1989. Thereafter, Providence Journal Telecommunications, Inc. (Providence) filed a "Petition for Reconsideration, Petition to Deny and Petition for Revocation of License" regarding the transfer of control of Billings Cellular Corporation (BCC) from Cellular of Northwest Ohio (CNO) to C.I.S. of Billings, Inc. (CISB).

2. The Commission, Providence, CNO, CISB and Cynthia Neff have reached an agreement that resolves the matters raised by the petitioner. The terms and conditions of this agreement are contained in the attached Consent Decree.

3. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We find that the public interest would be served by approving the Consent Decree, the terms of which are incorporated herein by reference.

4. Accordingly, IT IS ORDERED that the Consent Decree IS ADOPTED.

5. IT IS FURTHER ORDERED that the petition filed by Providence IS DISMISSED.

6. IT IS FURTHER ORDERED that the grant of above captioned application IS AFFIRMED, conditioned on compliance with Paragraph 10 of the Consent Decree.

7. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CELLULAR OF
NORTHWEST OHIO, INC.,
Transferor

and File No. 84622-CL-TC-1-88

C.I.S. OF
BILLINGS, INC.,
Transferee

For Consent to Transfer Control
of the Licensee of Billings Cellular
Corporation in the Domestic Public
Cellular Radio Service for Station
KNKA670 in Billings, Montana

CONSENT DECREE

1. Cellular of Northwest Ohio, Inc. (CNO) was the majority owner (50.4%) of the partnership (Billings Cellular Partnership), which in turn is the sole owner of Billings Cellular Corporation (BCC), the licensee for Station KNKA 670, the non-wireline cellular carrier in Billings, Montana. CNO agreed to transfer its interest in the licensee to C.I.S. of Billings, Inc. (CISB), and the unopposed transfer application was approved by the Commission on December 29, 1988. Public Notice, Report No. CL-89-61, January 11, 1989.

2. On February 7, 1989, Providence Journal Telecommunications, Inc. (Providence) filed a "Petition for Reconsideration, Petition to Deny and Petition for Revocation of License" (Petition) regarding the transfer and challenging the qualifications of CNO. The petition stated that two of CNO's principals had been convicted of felonies involving drug smuggling and that these convictions had not been reported to the Commission in applications that called for the reporting of felony convictions.

3. Robert Neff was the single largest owner of CNO (33 1/3%) and an officer and director. His brother, William Neff, was also an officer and director of CNO but not an owner. Robert Neff was indicted in the U.S. District Court for the Northern District of Ohio in October of 1986 on three counts relating to a conspiracy to smuggle approximately 11,000 pounds of marijuana from Colombia into the United States for the purposes of sale. In

March 1987 the United States Attorney for the Western District of Ohio filed an Information charging Robert Neff with having made a false statement to a federal official who was investigating the criminal activity of William Neff. In March 1987 Robert Neff agreed to plead guilty to one count of the October 1986 indictment. His plea was entered in February 1988. He was given a three year suspended sentence and placed on probation for a three year period. He was also fined $500 with regard to the false statement charge.

4. William Neff was indicted on four drug felony counts in the United States District Court for the Southern District of Alabama in 1982 involving a conspiracy to possess and distribute 27,500 pounds of marijuana to be smuggled into the United States from Colombia. He pleaded guilty to one count and was sentenced to six years imprisonment (a term that was subsequently reduced to time served - less than six months). On May 1, 1986 William Neff pleaded guilty in Virginia to conspiring to distribute more than five pounds of marijuana. He was given a thirty-year suspended sentence and placed on probation. In October 1986 William Neff was indicted, along with his brother, on charges related to the conspiracy to smuggle 11,000 pounds of marijuana. He too pleaded guilty to one charge. His plea was entered on February 29, 1988 and he was given a three-year sentence.

5. None of these convictions was reported to the Commission even though the Neff brothers were principals of CNO and the information was called for by various applications that were pending or filed at the time of or after the indictments and convictions. The Neff brothers signed the applications in question on behalf of the applicant and there is no indication that any other officer or director of CNO or its counsel were aware of the indictments or convictions at the time the applications were filed. After Providence filed its petition, Robert Neff resigned from his positions with CNO and BCC. William Neff had resigned from his positions with CNO and BCC following his guilty pleas in May 1988. Robert Neff has given his CNO stock to his wife, Cynthia Neff.

6. For the purposes of this Consent Decree, the following definitions apply:

(a) "Parties" means Cellular of Northwest Ohio, Inc., C.I.S. of Billings, Inc., Cynthia Neff and Providence Journal Telecommunications, Inc.

(b) "Order" means an Order of the Commission adopting the terms and conditions of this Consent Decree, dismissing the petition filed by Providence and formally affirming the grant of the captioned application for transfer of control, subject to the parties' compliance with the terms in paragraph 10 of this Decree.

7. The parties admit the jurisdiction of the Commission over them and over the subject matter of this action for the purposes of this Consent Decree and any Order described in paragraph 6(b).

8. The parties agree that upon signing by the Commission and by the parties, the provisions of this Consent Decree shall be incorporated by reference in any Order described in paragraph 6(b) that formally adopts this Consent Decree and terminates the captioned proceeding.

9. The parties waive any rights they may have to appeal any Order described in paragraph 6(b).

10. In consideration for the Commission's entering into this Consent Decree, in order to avoid any disruption of service to the public and to avoid litigation costs, the parties agree to the following terms:

(a) CNO will make a voluntary contribution to the United States Treasury, without further protest or recourse, in the amount of $500,000 within fifteen days of the date on which the Order becomes final and unappealable. This money is to come from funds from the Billings transfer as paid by CISB to CNO that would otherwise have gone to Cynthia Neff. Cynthia Neff has surrendered her CNO stock to the corporation. In addition, certain legal fees, interest, and other expenses have been paid or incurred by CNO, CISB and Providence and those expenses are to be reimbursed by CNO from the account of Cynthia Neff pursuant to separate agreement of the parties. As a result, Cynthia Neff shall receive no more than $203,530 which amount represents less than her proportionate interest in CNO's non-Billings related holdings. Also, Cynthia Neff agrees that the contribution of $500,000 to the United States Treasury is not to be construed as a contribution made by her and she is not entitled to and will not claim a tax deduction for the contribution.

(b) CISB, having already closed on the transfer transaction but not having made disbursements, agrees to disburse funds to CNO simultaneously with the contribution and reimbursements mentioned in (a) above being made.

11. In light of the covenants and representations contained in this Decree, and in express reliance thereon, the Commission agrees that it will take no further action against the parties listed in paragraph 6(a) for the conduct specified in paragraphs 3 to 5 of this Decree and will issue the Order described in paragraph 6(b) of this Decree.

12. The parties understand and accept that the Order terminating this proceeding and allowing CISB to retain its interest in the licensee shall be conditioned on compliance with paragraph 10 of this Decree. If paragraph 10 is not complied with, the Commission may, in its sole discretion, declare the Consent Decree to be null and void, set aside the transfer authorization, and pursue whatever rememdies are available including revocation of license.

13. The parties agree that any violation of the Order incorporating the terms of this Consent Decree shall constitute a separate violation of a Commission Order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission Order.

14. If the Consent Decree is not signed by the Commission and each of the parties, or is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any fashion in a legal proceeding.

15. If the Commission brings an action in United States District Court to enforce the terms of the Order, the parties agree that they will not contest the validity of the Order, will waive any statutory right to a trial *de novo* and will consent to a judgement incorporating the terms of this Consent Decree.

FEDERAL COMMUNICATIONS COMMISSION

Cellular of Northwest Ohio, Inc.

C.I.S. of Billings, Inc.

Cynthia Neff

Providence Journal Telecommunications, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MEMPHIS DISPATCH, INC. — File Nos. 21910-CD-P/ML-01-90, 24319-CD-P/ML-01-90

For facilities in the Public Land Mobile Service at Jonesboro and Paragould, Arkansas for station KNKJ301

ANSWER FORT SMITH, INC. — File No. 22919-CD-P/ML-01-90

For facilities in the Public Land Mobile Service at Jonesboro, Arkansas for station KNKC502

SNIDER COMMUNICATIONS CORP. d/b/a SNIDER TELECOM — File No. 23685-CD-P/ML-01-90

For facilities in the Public Land Mobile Service at Jonesboro, Arkansas for station KNKB939

MEMORANDUM OPINION AND ORDER

Adopted: February 19, 1991; Released: February 25, 1991

By the Chief, Mobile Services Division:

I. BACKGROUND

1. Memphis Dispatch, Inc. (Memphis) filed applications to establish facilities on frequency 158.10 MHz at Jonesboro and Paragould, Arkansas. Answer Fort Smith, Inc. (Answer) and Snider Communications Corp. d/b/a Snider Telecom (Snider) also filed applications to establish facilities on frequency 158.10 MHz at Jonesboro, Arkansas. The applications are electrically mutually exclusive.[1] Memphis has existing facilities on frequency 158.10 MHz within 40 miles at Piggott, Arkansas. On September 10, 1990, Memphis filed a request for comparative hearing for the four mutually exclusive applications pursuant to Section 22.33(c) of the Commission's rules.[2] Answer filed an opposition to the request, and Memphis filed a reply. For the reasons stated below we deny the request.

II. CONTENTIONS

2. Memphis states its proposed Jonesboro and Paragould stations are the final sites needed for region-wide coverage and would provide continuous paging service over 5,164.5 miles, whereas the proposed service areas of Snider and Answer cover much less area than that of Memphis. Memphis also contends that unless Jonesboro is licensed to it: (1) Paragould would become an unserviced "wasteland" between two closely spaced stations operated by two different licensees because of the need for geographic spacing of stations to provide interference-free operation, and (2) service would be denied to the entire area between the Paragould and Jonesboro stations in order to protect Memphis' Piggott facility from interference. Memphis further argues that its survey of 36 existing customers (categorized as 12 agricultural, 12 service, and 12 professional) served by its Piggott station indicates that 17 of them are interested in using 25 paging units on Memphis' proposed service areas in Jonesboro or Paragould.

3. In opposition, Answer argues that Memphis' hearing request must be denied because it was untimely filed.[3] Answer claims that Memphis' request fails to make the required public interest showing. Answer asserts that Memphis did not show sufficient subscriber demand because it shows only 17 subscribers and did not identify the subscribers. Further, Answer contends that Memphis does not show a unique purpose for the proposed facilities but merely seeks to expand its operation further into Arkansas.

4. In reply, Memphis argues that its request is timely because the August 15, 1990 *Public Notice* is the only one which listed the captioned applications as mutually exclusive and, thus, is the public notice triggering the 30-day deadline for filing its request. Memphis states that it has demonstrated sufficient demand for its proposal. Finally, Memphis asserts that its service proposal is unique because it is an existing licensee which must utilize frequency 158.10 MHz to expand its existing authorized system. Answer and Snider, on the other hand, are new applicants in the area which could use any available frequency for their proposed service, according to Memphis.

III. DISCUSSION

5. We conclude that Memphis' September 10, 1990 request for a comparative hearing is timely filed. Its request involves all four captioned applications, and the public notice listing the four captioned applications as mutually exclusive was released on August 15, 1990. Therefore, Memphis' request was filed well within the 30-day deadline triggered by this public notice.

6. Memphis has failed to demonstrate that it is eligible for a comparative hearing. Selection by lottery among mutually exclusive applicants is the general rule, and exceptions to the rule are strictly construed and enforced. *See, e.g., Metro Mobile Corporation*, 5 FCC Rcd 1040 (Mob. Serv. Div. 1990 (*Metro Mobile*); *Mobile Phone of Texas*, Mimeo No. 2728 (Mob. Serv. Div. released Feb. 22, 1985). Section 22.33(c)(1) provides that applicants requesting a comparative hearing satisfy certain requirements. Memphis has satisfied one of these requirements because its proposed transmitters at Jonesboro and Paragould are located within 40 miles of an existing Memphis location at Piggott and is for the same frequency.

7. Section 22.33(c)(1), however, further requires that an applicant demonstrate demand by existing subscribers for expanded service. We find that Memphis' showing contained in its hearing request is not sufficient to justify a comparative hearing. We have previously denied hearing requests when an applicant did not submit specific information which is necessary to comply with Section 22.33(c)(1). *See Bay Springs Telephone Co.*, 3 FCC Rcd 2133 (Mob. Serv. Div. 1988) (mere assertion that all subscribers contacted signed written requests for proposed expanded service found unpersuasive); *Radio Call Company of Long Island, Inc.*, 2 FCC Rcd 6772 (Mob. Serv. Div. 1987) (mere representation that expanded service is needed in response to subscriber demand is insufficient); *Speed Call Inc.*, 2 FCC Rcd 6530 (Mob. Serv. Div. 1987) (subscriber survey forms submitted to indicate demand were found insufficient). Memphis has merely presented three general categories of subscribers who have a need for the proposed service, without identifying those customers. We have consistently found such showings to be inadequate to justify a comparative hearing. *See, e.g., Metro Mobile, supra.* Moreover, unsubstantiated allegations of disparities in the coverage areas of the mutually exclusive applications are insufficient to justify a comparative hearing. *Contact Express, Inc.*, 5 FCC Rcd 4575 (Mob. Serv. Div. 1990). Memphis' assertion that its needs for wide-area operations on specific frequency 158.10 MHz is unpersuasive. *See American Paging, Inc. (of Connecticut, Inc.)*, 2 FCC Rcd 4517 (Com. Car. Bur. 1987) (claim that frequency 928.9375 MHz was only frequency available was rejected). Similarly, Memphis has failed in its hearing request to show that the public interest would be served by using a comparative hearing procedure. Therefore, we deny Memphis' request for comparative hearing.

IV. ORDERING PARAGRAPHS

8. Accordingly, IT IS ORDERED that the request for comparative hearing filed by Memphis Dispatch, Inc. IS DENIED.

9. IT IS FURTHER ORDERED that a lottery between the captioned applications of Memphis Dispatch, Inc., Answer Fort Smith, Inc., and Snider Communications Corp. d/b/a/ Snider Telecom SHALL BE HELD at a time and place to be specified in a subsequent public notice.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] By *Lottery Notice*, PMS-39-5 (released July 20, 1990), the Commission set Memphis' and Answer's Jonesboro applications for lottery. The Commission's *Public Notice*, Rpt. No. 90-44, Mimeo No. 4221 (released Aug. 1, 1990), listed the three captioned Jonesboro applications as being mutually exclusive. The Commission's *Public Notice*, Rpt. No. PMS-90-46, Mimeo No. 4411 (released Aug. 15, 1990), subsequently listed all four captioned applications as being mutually exclusive.

[2] Section 22.33(c)(1) states that a mutually exclusive applicant is eligible to request a comparative hearing in lieu of the random selection procedure if it is:

> [a]n applicant proposing to add one or more transmitter locations to an authorized station on the same frequency or frequencies for which it is already licensed and within 40 miles of existing transmitter locations on those frequencies, and when the applicant demonstrates in its application a demand by its existing subscribers for the expanded service; . . .

[3] Section 22.33(c) establishes that a request for a comparative hearing must be filed within 30 days from the public notice listing the applications as mutually exclusive.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

NORTHERN STATES POWER COMPANY — File No. 63500-90-22-RPS

Notice of Apparent Liability for Forfeiture Penalty for operating Station KLF615 in the Public Mobile Service at Minot, North Dakota

MEMORANDUM OPINION AND ORDER

Adopted: February 19, 1991; Released: February 25, 1991

By the Chief, Mobile Services Division:

1. Northern States Power Company (Northern States) has filed a request seeking a recission or reduction of the $5,000.00 forfeiture imposed by the Mobile Services Division (MSD) in a Notice of Apparent Liability for Forfeiture (*NALF*) issued September 6, 1990.

I. BACKGROUND

2. On July 24, 1969, the MSD granted authority to construct and operate Station KLF615 at Minot, North Dakota. The station's facilities were relocated in 1987 to the current Minot site, and the authorization was effective through July 1, 1988. Northern States failed to timely file its renewal request to operate the station. On June 19, 1990, Northern States filed FCC Form 401 to reinstate its expired authorization. On July 11, 1990, the Commission received Northern States' request for Special Temporary Authority (STA) to continue to operate Station KLF615 at Minot, pending Commission action on the application for reinstatement of the expired authorization. On July 26, 1990, the MSD granted the STA, effective July 30, 1990 to January 30, 1991. On September 6, 1989, the MSD issued the *NALF*, finding that an apparent violation of Section 22.3 of the Commission's rules had occurred for operating Station KLF615 in an unauthorized manner, and imposed a forfeiture of $5,000.00.

II. NORTHERN STATES' CONTENTIONS

3. Northern States argues that a number of facts warrant eliminating or reducing the amount of the forfeiture. Northern States asserts that its failure to timely renew its authorization was entirely unintentional and contained no element of bad faith because the violation was inadvertent. It asserts that when the license came up for renewal, the Commission had just changed the duration of the license term, thus creating considerable uncertainty and confusion as to whether the license was properly renewed. Northern States contends that because the license involved is its only radio common carrier authorization, its confusion should be understandable. Additionally, Northern States contends that it voluntarily disclosed the violation and has no prior history of rules violations. Northern States thus requests cancellation or, alternatively, reduction of the forfeiture.

III. DISCUSSION

4. The Commission established a schedule, on a service-by-service basis, of the dates on which licenses expire. *See Common Carrier and Satellite Licensing Procedures Pursuant to the Communications Amendments Act of 1982*, CC Docket No. 83-371, 53 Rad. Reg. 2d (P&F) 1514 (1983) at note 11. In addition, the Commission issued *Public Notice*, Mimeo No. 2661 (released Apr. 21, 1988), which referenced Section 22.45 of the Commission's rules and stated in pertinent part:

> Wireline common carriers are required to file renewal applications for Public Mobile service authorizations no earlier than 60 days but not less than 30 days before July 1, 1988 and non-wireline common carriers no earlier than 60 days but not more than 30 days before April 1, 1989. *See* Rule Section 22.45.

In view of the definitive statement of this notice and the applicable rule, we are unpersuaded by Northern States' asserted claim that there was uncertainty and confusion as to whether its license had been properly renewed.

5. Furthermore, the fact that Northern States' violation might have been unintentional does not alter the fact that unauthorized operation existed and that the violation continued over a period of time. We have previously noted that

> The fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question . . . .

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397 (Com. Car. Bur., released Feb. 16, 1983). *See also* Section 312(f) of the Communications Act of 1934, as amended (the Act), which defines "willful." Northern States' voluntarily notifying the Commission of a potential rule violation, taking remedial action, and having no prior rules violations history were factors properly taken into account by the MSD in setting the amount of forfeiture. The factors do not negate culpability. *See* Section 503(b)(2)(B) of the Act; *Delray Cellular Associates*, 4 FCC Rcd 2233 (1989).

6. In conclusion, Northern States has not justified a remission or reduction of the forfeiture imposed by the *NALF* and, consequently, we uphold the $5,000.00 forfeiture.

IV. ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED that the request seeking recission or reduction filed by Northern States Power Company IS DENIED.

8. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 503(b), and Section 1.80(f)(4) of the Commission's rules, 47 C.F.R. Sec. 1.80(f)(4), that Northern

States Power Company FORFEIT to the United States the sum of Five Thousand Dollars ($5,000.00) for the violation of Section 22.3(b) of the Commission's rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission payable to the order of the Federal Communications Commission within thirty (30) days from the date of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P. O. Box 10209, Washington, DC 20036.

9. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to section 504(a) of the Communications Act, as amended, 47 U.S.C. Sec. 504(a).

10. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Northern States Power Company by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

OLIVETT INTERNATIONAL, INC. File No. 21464-CD-P/ML-01-87

For additional Public Land Mobile Service facilities to operate on 158.70 MHz at Emporia, Kansas

and File No. 21465-CD-P/ML-01-87

For additional Public Land Mobile Service facilities to operate on 158.70 MHz at Manhattan, Kansas

CELESTIAL, LTD File No. 22484-CD-P/L-01-87

For new Public Land Mobile Service facilities to operate on 152.84 MHz at Emporia, Kansas

GLEN PUETT d/b/a BELL ANSWERING SERVICE File No. 23452-CD-P/L-01-87

For new Public Land Mobile Service facilities to operate on 152.84 MHz at Manhattan, Kansas

MOBILFONE OF KANSAS, INC. File Nos. 22515-CD-TC-01-87, 60023-CR-TC-01-87

For Transfer of Control of Public Mobile Service and Rural Radio Service Stations to Olivett International, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: February 19, 1991; Released: February 25, 1991

By the Chief, Common Carrier Bureau:

1. On November 16, 1987, the Mobile Services Division (MSD) adopted an Order, 2 FCC Rcd 7027 (1987) (MSD Order), granting the referenced applications of Olivett International, Inc. (Olivett), Celestial, LTD (Celestial), Glen Puett d/b/a Bell Answering Service (Puett), and Mobilfone of Kansas, Inc. (Mobilfone).[1] On December 23, 1987, Allied Companies, Inc. (Allied) filed a petition for reconsideration of the above grants requesting that the Commission either: (1) reconsider and reverse the MSD Order and dismiss all the above-captioned applications; (2) reconsider and reverse the Order and designate the above-captioned applications for a consolidated hearing; or (3) reconsider and reverse that portion of the Order that granted Olivett's application for 158.70 MHz at Emporia, Kansas. Olivett[2] and Celestial filed an opposition to the petition for reconsideration and Allied filed a consolidated reply. [3]

I. BACKGROUND

2. On October 23, 1986, Allied filed an application for additional 158.70 MHz facilities for Station KTS271 at a location near Emporia, Kansas. On November 6, 1986, Allied filed another application for additional 158.70 MHz facilities for the same station at a location near Manhattan, Kansas. Allied's 158.70 MHz application for Emporia was listed as accepted for filing by Public Notice dated November 5, 1986. Allied's application for Manhattan was listed as accepted for filing by Public Notice dated November 19, 1986. On December 31, 1986, Olivett filed a competing application for additional 158.70 MHz facilities for Station KVC980 at Emporia and Manhattan. Celestial filed an application for the 152.84 MHz frequency at Emporia on March 2, 1987, and Puett filed an application for the 152.84 MHz frequency at Manhattan on March 31, 1987. In its petition to deny Olivett's application, Allied alleged that Olivett's applications were strike applications, that Olivett was the undisclosed real party in interest behind the Celestial and Puett applications, and that therefore, Olivett lacked the requisite character qualifications to be a Commission licensee.

3. In its Order, the MSD found that Allied had not presented sufficient evidence to raise a substantial question of fact whether Olivett filed a strike application. A strike application is an application filed solely or in part for the purpose of preventing or delaying the grant of another application and is prohibited by Commission policy.[4] MSD found that Olivett filed its application after the public notices which announced Allied's Emporia and Manhattan applications were accepted for filing, and that Olivett would derive economic benefit by expanding its system into Emporia and Manhattan. The MSD noted that Olivett stated that it applied for the 158.70 MHz frequency in competition with Allied instead of applying for 152.84 MHz, because, at the time that Olivett filed its applications, the 152.84 MHz frequency was not available, according to the Commission's staff study list.[5] Finally, Olivett had amended its original application to provide frequency studies, stating that it was unable to obtain a copy of the engineering data in Allied's application in order to prepare its own frequency studies. Accordingly, based on the facts as presented, the MSD declined to conclude that Olivett had filed a strike application.

4. In addition, the MSD Order found that, based on the facts before it, there was insufficient evidence to conclude that Olivett was the real party in interest behind the Celestial and Puett applications. The MSD Order noted that . . . [T]he test for determining whether a third person is a real party in interest is whether that person has an ownership interest, or is, or will be in a position to

actually or potentially control the operation of the station." *See Sumitron Broadcasting*, 15 FCC 2d 400 (Rev. Bd. 1968); *see also*, *W. P. Scamardo d/b/a Hearne Mobilfone*, Mimeo No. 6570 (Com. Car. Bur., released August 27, 1986).[6] Using the factors enunciated in *Scamardo*, the MSD found that Allied had not presented any evidence that Olivett has an ownership interest in the Celestial or Puett applications, or sufficient proof that Olivett was in a position to control Celestial or Puett.[7] Given the MSD's findings, the MSD found no basis to deny the above-captioned applications or the transfer of control application of Mobilfone to Olivett.

II. CONTENTIONS OF THE PARTIES

5. In its petition, Allied claims that new facts have come to its attention which demonstrate that Olivett and its principal, Phil L. Woodbury, d/b/a Kan Page,[8] have violated Commission rules and lack the character qualifications to be a licensee. As a result of monitoring frequencies in November and December 1987, Allied alleges that it learned that Olivett retransmitted traffic from its 152.24 MHz public land mobile service one-way paging system in Topeka over Woodbury's 152.48 MHz private land mobile one-way paging facilities in Topeka. It argues that the retransmission was a scheme to load frequency 152.48 MHz improperly, thus forcing Glenn Puett off 152.48 MHz and giving Puett justification to apply for the 152.84 MHz frequency in Manhattan.[9] This, Allied alleges, is part of a scheme to block Allied's expansion of its existing 158.70 MHz system and tie up the remaining 150 MHz paging frequencies in Manhattan.[10] This retransmission, Allied alleges, violates the Commission's rules and demonstrates that Olivett lacks the requisite character to be a Commission licensee.

6. Allied also argues that based on the guidelines in *Grenco*, the facts warrant a finding that Olivett's Emporia and Manhattan applications were filed as strike applications. Allied alleges that Olivett will receive substantial economic and competitive benefit by delaying and blocking Allied's expansion into Emporia and Manhattan because Olivett recently acquired numerous public land mobile services facilities in the tri-city, Topeka, Emporia and Manhattan area. Allied claims that Olivett is trying to frustrate competition and preclude entry of another carrier into the tri-city market. Allied argues that the MSD Order failed to apply the correct legal standard with respect to the strike issues. In this regard, it contends that the Order appears to have applied the stringent standard enunciated in *Stockton Mobilephone, Inc. & A. Michael Lipper d/b/a Lipper-Larue*, Mimeo No. 6318 (August 13, 1986), which requires a showing that the "primary and substantial purpose behind the application is . . . delay." Instead, Allied argues, the MSD Order should have applied the legal standard used in *Millar v. FCC*, 707 F.2d 1530, 1536 (1983), which provides that an application will be dismissed as a strike application if it was filed solely or in part to impede, obstruct, or delay grant of another application.

7. With respect to the real party in interest issue, Allied claims that the MSD Order failed to consider the most significant criterion in *Scamardo*, "a motive for deception." *Scamardo*, slip op. at 3. Allied alleges that the motive was to obstruct and to delay Allied's expansion into the Emporia, Manhattan, and Topeka paging markets, and circumvent Section 22.16 of the Rules[11] by inducing Celestial and Puett to apply for 152.84 MHz, the other available 150 MHz band paging frequency, at Emporia and Manhattan.

8. In its opposition, Olivett states that Allied failed to raise new facts which require reconsideration. Olivett admits that Mobilfone's 152.24 MHz traffic was retransmitted on Woodbury's 152.48 MHz frequency. However, Olivett contends that the retransmission, which occurred from September 1987 to the end of December 1987, was done for testing purposes in order to simulate a heavy usage environment and to isolate and eliminate intermodulation[12] interference received from the Shawnee County Emergency Preparedness Office (SCEP) in Topeka. Moreover, Olivett contends, the retransmission could not have been for the purpose of giving Puett justification to move from the 152.48 MHz frequency; Puett filed its application for the 152.84 MHz frequency in March 1987, months before the retransmission began.

9. With regard to the strike application issue, Olivett states that the MSD Order properly applied the facts to the elements in *Grenco*. Olivett reiterates that, although Olivett's application was filed after Allied's application, its application for 158.70 MHz was filed both to relieve congestion on its existing 152.24 MHz facilities and to provide expansion of its existing 158.70 MHz paging service in Topeka into Emporia and Manhattan, and that the 158.70 MHz frequency was the only one available at the time that would serve both purposes. With respect to Allied's concern that the MSD Order failed to apply the correct legal standard to the strike application issue, Olivett points out that the MSD Order applied the "traditional" strike policy, as set forth in *Grenco*, and that the legal standard used in *Millar v. FCC*, the case cited by Allied, is essentially the same standard used in *Grenco*.

10. Moreover, Olivett notes, since the Order found that Olivett lacked the requisite control over Celestial and Puett, there was no reason to consider a motive for deception in determining whether there was a real party in interest issue. Celestial's opposition states that Allied has provided no new facts or arguments to dispute the Order's finding that Olivett was not the real party in interest in the Celestial and Puett applications.[13]

11. Allied replies that Olivett is guilty of misrepresentation in its pleadings because Mobilfone's retransmission began as early as June 1987, instead of September 1987, as Olivett states in its opposition. Allied notes that through routine monitoring of these channels, it detected retransmissions of 152.24 MHz traffic on 152.48 MHz at Manhattan during June, July and August 1987. This monitoring, Allied states, continued from mid-August through October, and was in addition to the monitoring from November and December 1987 referred to in Allied's petition, demonstrating that the retransmission started before Olivett received a complaint from SCEP. In response, Olivett contends that the earlier retransmissions were for the purpose of testing transmitter equipment that was installed in April or May 1987. Olivett states that it did not mention the earlier retransmission in its prior pleadings because at that time Woodbury (Olivett's principal) had not been informed by his chief technician, Myron Nolind, that the retransmission had taken place. Olivett notes that Nolind's first statement was in response to the period referred to in Allied's petition, November to December 1987. Olivett concludes that having explained the reason for the earlier transmission and why it was not mentioned before, there has been no misrepresentation of

the facts. Allied replies that even if there were legitimate reasons for the retransmission, Olivett would be guilty of a violation under Part 90 of the Commission's Rules.[14]

12. In July 1988, Allied filed a supplement and successive pleadings reiterating the allegations concerning the retransmission over 152.48 MHz, and including a statement by Reuben Rowan who formerly worked for Mobilfone.[15] Rowan disagrees with Nolind's statement concerning the earlier retransmission. Rowan states that if the transmitter equipment was being tested during June and August 1987, he would have known about it and Mobilfone's principals would have been informed also. Further, he states that in late October or early November 1987, he was contacted by Joseph Tonguish, president of Olivett, concerning interference caused by Mobilfone's 152.24 MHz facility to another Olivett operation in the Topeka area. By the end of November 1987, Rowan states that he had resolved the interference problem. While he was not involved in the installation of the device, Rowan states that on December 29, 1987, he was told by his supervisor, Nolind, to disconnect the device that allowed subsequent retransmission of 152.24 MHz traffic over Woodbury's 152.48 MHz facility. He noted that Nolind told him the purpose of the device was to make the 152.48 MHz appear busier than it actually was and that it was Rowan's impression that the retransmission had been conducted in connection with litigation between Olivett and Allied.

13. In opposition, Olivett asserts that Rowan is a biased party, and that while Rowan assisted Nolind's work on a transmitter, Rowan was not fully knowledgeable about Nolind's duties.[16] In an affidavit, Nolind states that installation and testing were his responsibility not Rowan's. Rowan, he contends, was responsible for the installation of mobile units in automobiles and offices at the radio shop several blocks from the transmitter site, in addition to some routine maintenance duties. Nolind states that the purpose of the "rollover device" that permitted retransmission was to make the channel appear busier to simulate heavier loading for testing purposes only. Because of his experience and position, Olivett states that Nolind had the authority to conduct testing on his own and without Olivett being aware of the simulcasting over both the 152.24 MHz and 152.48 MHz systems. Nolind's immediate supervisor, Tonguish, states that he relied on Nolind's expertise. Olivett reiterates that the retransmission of traffic on the 152.48 MHz frequency after August 1987 was for the legitimate purposes of stopping interference with SCEP, and to isolate and eliminate interference to Mobilfone's other operations.

14. In reply, Allied contends that Rowan was familiar with the operation of Mobilfone and had substantial responsibilities with respect to Mobilfone's facilities.[17] Rowan states that he does not believe that Nolind would retransmit for four months without the knowledge of his supervisors, and that if any testing were being done, Rowan believes that he would have known about it.

III. DISCUSSION

A. Retransmission and Character Qualifications

15. Section 1.106(c) of the Rules states in pertinent part that a petition for reconsideration that relies on facts not previously presented may be granted if "[t]he petition relies on facts unknown to the petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity" or "[t]he Commission or the designated authority determines that consideration of the facts relied on is required in the public interest." *See* 47 C.F.R. Section 1.106(c).

16. Allied's petition states that it monitored the retransmission in November and December 1987, and its reply adds that the same retransmission was detected during routine monitoring as early as June 1987. Thus, Allied had sufficient opportunity to bring the matter of the retransmission to the Commission's attention in a supplemental pleading prior to the MSD Order, which was released in November 1987. We, therefore, deny the retransmission portion of its petition on this ground. Nevertheless, we can also deny Allied's petition on the merits.

17. Allied argues that Olivett lacks the requisite character qualifications to be a Commission licensee because the retransmission on private land mobile frequencies violated the Commission's rules and the retransmission was part of a scheme to block Allied's 158.70 MHz expansion into Emporia and Manhattan. In addition, Allied argues that Olivett misrepresented information provided to the Commission in responding to Allied's allegation that the retransmission was part of a scheme to block Allied's expansion.

18. We are not persuaded by Allied's argument that the retransmission was part of a scheme to block its 158.70 MHz expansion. Puett's application for 152.84 MHz at Manhattan was filed in March 1987, several months before the period that Olivett retransmitted paging signals over Woodbury's 152.48 MHz frequency. Thus, Olivett's retransmission could not have been the reason for Puett applying for the 152.84 MHz frequency in Manhattan. With respect to Allied's allegation of misrepresentation, Olivett has pointed out that the reason that it did not mention its June 1987 retransmission in its opposition was that Olivett was responding to the later time period specifically discussed in Allied's petition, the September through December time frame. It had no need to address the earlier period of retransmission until Allied raised the issue in its reply to the opposition. Thus, we find that Olivett did not misrepresent the facts. While Olivett admits to retransmitting on a private land mobile radio frequency for testing purposes in June 1987, Allied's claim that Olivett was offering common carrier services to customers over that frequency in violation of the Commission's rules is unsupported. Finally, with respect to Mr. Reuben Rowan's statement that it was his impression that the retransmission had been conducted in connection with the litigation between Olivett and Allied, no evidence, other than mere conjecture, has been submitted to support this allegation. Thus, we find that the record does not support a finding that Olivett violated the Commission's rules or that Olivett lacks the requisite character qualifications to be a licensee (*see also* para. 24 on hearing designation issue). Thus, the retransmission does not warrant a reversal of the MSD Order.

B. Strike Applications

19. Allied has not provided any new facts in its petition to alter the MSD Order's conclusion that Olivett did not file a strike application. It argues that the MSD Order was in error in applying its findings of fact using the *Grenco* test and made an incorrect conclusion of law. Allied's characterization of the standard applied in the MSD Order is rejected. The Order set forth the guidelines to be

considered in determining whether an application is a strike application, applied them to the facts as presented, and correctly concluded that Allied failed to produce a prima facie case that Olivett had filed a strike application. Allied argues that it has shown that Olivett's application was filed merely to delay grant of Allied's application. However, Allied has submitted no evidence to support this argument. It is undisputed that Olivett has a paging system in the area, and that it needed to relieve congestion on its existing 152.24 MHz facilities and to provide expansion of its existing 158.70 MHz paging system. At the time that Olivett filed its application, only the 158.70 MHz frequency was both available and economically feasible to use for both purposes. While frequency 152.84 was in fact available, our data base showed that this frequency was occupied by U.S. Telespectrum. Olivett avers that it wanted to expand its paging system just as Allied did. Due to the limited number of 150 MHz paging frequencies that are available, it is not unusual for several applicants to apply for the same frequency. In *Millar*, 707 F.2d at 1536, the Court stated that in determining whether an application is a strike application "the crucial element was and is an intent to block another application." In making this determination the Court recognizes the use of the Commission guidelines issued in *Grenco* to evaluate the evidence of a motive to file a strike application. Olivett has an existing paging system and the fact that it wanted to expand its system does not, in itself, demonstrate that its applications were filed for the purpose of blocking Allied's expansion. Allied has provided no facts to support its allegation that Olivett's application was filed in whole or in part, merely to delay or impede Allied's expansion of its facility, instead of for legitimate expansion reasons of its own. We, therefore, find that the MSD Order correctly concluded that Allied had not demonstrated that Olivett filed a strike application.

C. Real Party in Interest

20. We agree with Olivett's and Celestial's assertions that Allied's petition merely reiterates its allegation that Olivett is the real party in interest behind the Celestial and Puett applications without providing any new facts to substantiate its claim.

21. First, we agree with the MSD Order's finding that no evidence was presented to show that Olivett has control, or a potential for control, over Celestial and Puett. Celestial states that it has only an arms-length commercial relationship with Mobilfone, Olivett's subsidiary. Celestial leases its control point and transmitter from Mobilfone, it used an engineer recommended by Woodbury, and Celestial's owner and Woodbury are acquainted. Celestial does not maintain a maintenance contract with Mobilfone, they have different attorneys and there is no familial relationship between Celestial and Mobilfone. These facts are insufficient to establish a prima facie case that Olivett was the real party in interest behind Celestial.

22. Puett's affidavit explains the facts that led to his decision to apply for the 152.84 MHz frequency at Manhattan. Puett was receiving interference unrelated to any facility connected with Olivett or Mobilfone and at a time before Olivett retransmitted paging signals over the 152.48 MHz frequency. As discussed in the MSD Order, there is no evidence of a familial or employment relationship between Olivett and Puett, and no evidence of a maintenance contract between Olivett and Puett. They shared the same engineer but do not share the same attorney. The fact that Puett leases space on the antenna tower owned by Woodbury, without more, does not indicate that Olivett is the real party in interest behind the Puett application. No new evidence has been presented herein to demonstrate that Puett was part of a scheme to interfere with Allied's expansion of its paging system. We, therefore, conclude that the MSD Order correctly found that Olivett was not the real party in interest behind the Celestial and Puett applications.

23. Second, we disagree with Allied that the MSD Order failed to consider Olivett's motive for deception in determining whether there was a real party in interest issue. Allied argues that it demonstrated Olivett's "motive for deception" by showing that Olivett attempted to block expansion of Allied's 158.70 MHz system by filing strike applications at Emporia and Manhattan and that Olivett hoped to circumvent the Commission's rules[18] by having Celestial and Puett apply for 152.84 MHz, the other guardband frequency, at both Emporia and Manhattan. However, the MSD Order correctly rejeted both arguments, finding that Allied failed to demonstrate that Olivett filed a strike application and that no evidence had been introduced to show that Olivett was in a position to control Celestial or Puett. Accordingly, Allied's argument concerning Olivett's motive for deception is without merit.

D. Hearing Designation Request

24. With respect to Allied's request that the Commission designate the above-captioned applications for a consolidated hearing, parties challenging an application and who seek a hearing must satisfy a two-prong test established in 47 U.S.C. Sec. 309(d)(1) and (2). *See Astroline Communications Company Limited Partnership*, 857 F.2d 1556, 1557 (D.C. Cir. 1988) ("*Astroline* "). The protesting party must present "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with the [the public interest, convenience, and necessity]." 47 U.S.C. Sec. 309(d)(1). The Commission must proceed "on the assumption that the specific facts set forth [in the petition] are true." *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). If the Commission determines that the petitioning party satisfies the threshhold standard, the inquiry proceeds to a second phase. Having found that such party has alleged a prima facie case that grant of the application would be inconsistent with the public interest, the Commission determines whether, "on the basis of the application, the pleadings filed, or other matters which it may officially notice[,] . . . a substantial and material question of fact is presented." 47 U.S.C. Sec. 309(d)(2). *See also Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). If the Commission concludes that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 U.S.C. Section 309(e).

25. In light of the foregoing, we conclude that there is no need to grant Allied's hearing request. Even assuming *arguendo* that Allied established a prima facie case that Olivett lacks the requisite qualifications to be a Commission licensee and that, therefore, grant of the captioned applications would be inconsistent with the public interest, we conclude that Allied has not satisfied the second prong of the *Astroline* test because substantial and material questions of fact have not been presented. With

respect to Allied's claim that Olivett's retransmission was part of a scheme to block Allied's 158.70 MHz expansion into Emporia and Manhattan, Olivett submitted affidavits by two employees responsible for testing procedures to support its explanation that the retransmission was for testing purposes. We find the conflicting statement by Mr. Reuben Rowan, a former employee with Mobilfone whose responsibilities did not include installation and testing, to be based on conjecture and not facts, and it therefore does not rebut Olivett's explanation for its retransmission.

26. Similarly, we do not believe that a hearing is required on the issue of whether Olivett filed strike applications. As discussed above at para. 18, the evidence demonstrates that Olivett had legitimate reasons for expanding its existing 158.70 MHz paging system, that it reasonably believed that the 158.70 MHz frequency was the only frequency available for its purposes, and that it was legally entitled to file the applications for Emporia and Manhattan at the time it did. Thus, no material question of fact is presented on the strike petition issue.

27. Finally, concerning Allied's argument that Olivett was the real party in interest behind Puett's and Celestial's applications, the evidence of record demonstrates, as discussed above at paras. 20 -23, that Olivett has no ownership interest in the Celestial or Puett applications, exercised no control or a potential for control over these applicants, and had no motive for deception. Based on the above, we find that Allied has not raised a substantial and material question of fact concerning the real party in interest allegations.

E. Other Matters

28. Allied has presented no additional information to indicate that the MSD Order should not have granted the transfer of control application of Mobilfone to Olivett. However, we agree with the part of Allied's petition that requests that the MSD's grant of Olivett's application for 158.70 MHz at Emporia, Kansas, referred to herein, be reversed. On July 31, 1987, prior to the adoption of the MSD Order, the MSD conducted a lottery for the 158.70 MHz frequency at Emporia, Kansas. Allied was the winner of that lottery and Olivett's application was dismissed.[19] Olivett has never contested the results of the lottery. Therefore, the part of the MSD Order granting Olivett's application for 158.70 MHz at Emporia was in error and is hereby reversed. We find Allied to be legally, technically and otherwise qualified to be a Commission licensee and that a grant of Allied's application for the 158.70 MHz frequency at Emporia, Kansas would serve the public interest.

IV. ORDERING PARAGRAPHS

29. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules, that the Petition for Reconsideration filed by Allied Companies, Inc. IS GRANTED to the extent indicated above, and in all other respects IS DENIED.

30. IT IS FURTHER ORDERED, that the grant of application File No. 21464-CD-P/ML-01-87, filed by Olivett International, Inc. for Emporia, Kansas, IS SET ASIDE, and the application IS DISMISSED.

31. IT IS FURTHER ORDERED, that the application filed by The Allied Companies, Inc. to serve Emporia, Kansas (File No. 20320-CD-P/ML-1-87) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Allied Companies, Inc. filed a petition to deny Olivett's applications, as well as petitions to deny Puett's and Celestial's applications. Since all these petitions involved Olivett, they were consolidated into one proceeding.

[2] Olivett's pleadings include responses for its subsidiary Mobilfone. The referenced MSD Order authorized the transfer of control of Mobilfone's public mobile service and rural radio service stations to Olivett.

[3] In addition to the initial set of pleadings that were filed, numerous other pleadings were filed by the parties. An additional 33 pleadings (motions, supplements, oppositions, replies, etc.) were filed between March 7, 1987 and October 31, 1988. Because of the nature of the arguments involved, we accept the additional pleadings filed by Olivett and Allied.

[4] *See Grenco Inc.*, 28 FCC 2d 166, 167 (1971). In *Grenco* the Commission set forth the following guidelines for determining whether an application is a strike application: "(1) the timing of the application; (2) the economic and competitive benefit occurring from the application; (3) the good faith of the applicant; and (4) questions concerning a frequency study." The absence of a frequency study in an application to determine the availability of alternative frequencies suggests that the application was not filed in good faith.

[5] United Telespectrum, another operator in the area, had abandoned the 152.84 MHz frequency, but this fact had not yet been reflected in the Commission's staff study list. In addition, Olivett stated that the 35.22 MHz frequency was not selected because it would not relieve congestion on Olivett's existing system using the 152.24 MHz frequency. The 35.22 MHz frequency requires a different receiver and, when used in combination with the 152.24 MHz frequency, would cost more to provide this service.

[6] In *W. P. Scamardo*, the Common Carrier Bureau set forth the following factors of control to be considered in evaluating a real party in interest allegation: (1) whether the applicant is a relative of the alleged real party in interest; (2) the presence of an employment tie between the applicant and the alleged real party in interest; (3) whether the alleged real party in interest will perform maintenance under contract for the applicant; and (4) shared legal counsel and engineering firm.

[7] Order, 2 FCC Rcd at 7028.

[8] Woodbury is the licensee for a business radio service station in Topeka, Kansas operating on frequency 152.48 MHz, a private land mobile radio frequency. Woodbury is also the president of Olivett's subsidiary Mobilfone, which operates on frequency 152.24 MHz, a public land mobile frequency, in Topeka, Kansas.

[9] Puett's paging service at that time operated on 152.48 MHz, a private radio land mobile radio frequency. On March 31, 1987, Puett filed an application for 152.84 MHz at Manhattan. Since private radio frequencies are shared, a licensee with high volume usage would prevent other users from being able to use the frequency in an efficient manner. Allied alleges that Olivett's retransmission loaded the 152.48 MHz frequency forcing Puett to go to another frequency to satisfy its customers.

[10] Allied was awarded the 158.70 MHz frequency at Emporia and Topeka, *see* para. 22 *infra*, and applied for the 158.70 MHz frequency at Manhattan. As a result of the Public Mobile Service lottery held on November 4, 1987, Olivett was awarded the 158.70 MHz frequency at Manhattan. There are only four 150 MHz one-way paging frequencies at Manhattan: (1) 158.10 MHz licensed to United Telespectrum, (2) 158.24 MHz licensed to Mobilfone, (3) 152.84 MHz awarded to Puett in the MSD Order, and (4) 158.70 MHz awarded to Olivett.

[11] Section 22.16 of the Rules prohibits a party from applying for more that one paging frequency at a time within the same geographical area.

[12] Intermodulation interference occurs when two different stations' signals mix, producing a third signal that may cause interference to a third station on a different frequency.

[13] *See* MSD Order, 2 FCC Rcd at 7028.

[14] Part 90 of the Rules governs licensees in the private land mobile radio service. Licensees under Part 90 of the Rules are responsible for ensuring that their facilities are used only for permissible purposes in a permissible manner and by persons authorized to use and operate such equipment, and that licensees minimize transmission time and utilization of the spectrum. Also, licensees under Part 90 of the Rules are prohibited from providing a common carrier service. 47 C.F.R. §§ 90.405 and 90.415. We wish to make clear, however, that while service to ineligible users is a violation of our Rules and may lead to enforcement action, it does not instantly convert an entity licensed as a private carrier into a common carrier. *See General Telephone Company of Southwest*, 5 FCC Rcd 1189 (1990).

[15] Reuben Rowan's declaration states that he was formerly employed by Mobilfone as a technician for radio operations in Topeka, Kansas from June 1987 until April 1988.

[16] Olivett contends that Rowan left Mobilfone because of a dispute he had over consulting fees with Mobilfone management and is now working for Allied.

[17] Rowan states that he rents an Allied pager, but he is not an employee of Allied. He disagrees with Olivett's statement that he quit over a refusal to pay a consulting fee.

[18] Section 22.525 of the Commission's rules provides in pertinent part that an applicant may file for only one paging frequency at a time in a given area.

[19] *See* letter from Chief, Mobile Services Division to Richard S. Myers, Esquire, notifying counsel that Allied's application was selected first in the lottery and that Olivett's mutually exclusive application was therefore dismissed (August 5, 1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-284

In the Matter of

Amendment of Section 73.202(b),	*RM-6138*
Table of Allotments,	RM-6474
FM Broadcast Stations.	*RM-6489*
(*Angola*, *Berne*, *Decatur*, Lagrange, and *Roanoke*, *Indiana*; Brooklyn and Hudson, Michigan)	

SECOND REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 6, 1991; Released: February 25, 1991

By the Acting Chief, Allocations Branch:

1. The Commission issued a *Notice of Proposed Rule Making* ("*Notice*") in this proceeding, 3 FCC Rcd 4031 (1988), in response to a petition filed on behalf of Lake Cities Broadcasting Corporation ("LCBC"). The *Notice* proposed to upgrade Station WLKI(FM), Angola, Indiana, by substituting Channel 287B1 (105.3 MHz) for its existing Channel 261A (100.1 MHz), and to modify its license accordingly. In order to accommodate LCBC's request for an upgrade, the *Notice* also proposed the substitution of Channel 262A for Channel 288A at Lagrange, Indiana, and Channel 225A for Channel 287A at Brooklyn, Michigan.[1]

2. In response to the *Notice*, two counterproposals were timely filed. First, Randall Bhirdo filed a counterproposal seeking the allotment of Channel 225A to Hudson, Michigan, in lieu of LCBC's proposed substitution of Channel 225A for Channel 287A at Brooklyn, Michigan (RM-6474). Second, Midwest Communications Company ("Midwest"), licensee of Station WQTZ(FM), Channel 224A, Decatur, Indiana, filed a counterproposal (RM-6489) seeking the substitution of Channel 286B1 for Channel 224A at Decatur and modification of its license accordingly. In order to accommodate its request, Midwest also requested the substitution of Channel 231A for Channel 286A at Roanoke, Indiana, and the modification of the construction permit of Judith A. Selby ("Selby") for a new station on that channel to specify Channel 231A.[2] Likewise, Midwest also requested the substitution of Channel 224A for Channel 230A at Berne, Indiana, for which one application (File No. BPH-881221MM) is pending.[3]

3. Thereafter, the Commission adopted a *First Report and Order* in this proceeding which addressed Bhirdo's counterproposal but deferred action on the Angola and Decatur proposals. Specifically, the *First Report and Order* allotted Channel 273A in lieu of Channel 225A to Hudson, Michigan.[4] The Commission also issued a *Request for Supplemental Information and Order to Show Cause* ("*Show Cause Order*"), 5 FCC Rcd 2000 (1990), regarding Midwest's counterproposal. Since Midwest's counterproposal would require the substitution of Channel 231A for Channel 286A at Roanoke, Indiana, the *Show Cause Order* requested that Selby show cause why her construction permit for Station WQTX(FM), Roanoke, Indiana, should not be modified to specify operation on Channel 231A (94.1 MHz) instead. We note that Midwest has indicated its willingness to compensate Selby for the reasonable costs of her changing frequencies. Additionally, the *Show Cause Order* sought to determine Midwest's willingness to reimburse CP Broadcasters, Inc. ("CPB"), licensee of Station WIFF(FM), Auburn, Indiana, for its reasonable costs associated with that station's change in frequency from Channel 288A (105.5 MHz) to Channel 272A (102.3 MHz), as orginally directed in MM Docket No. 81-61.[5] Selby, CPB, and Midwest all filed responses to the *Show Cause Order*. Selby and Midwest filed replies.

RESPONSES TO THE SHOW CAUSE ORDER

4. In response to the *Show Cause Order*, Selby objects to the proposed modification of her construction permit for Station WQTX(FM), Roanoke, to specify Channel 231A in lieu of the present Channel 286A. Selby claims that Channel 231A is not equivalent to Channel 286A because she could not operate on the former channel at the maximum effective radiated power ("ERP") of 6 kilowatts allowable for Class A stations as specified in the newly revised Rule Section 73.211(b)(1).[6] She contends that sufficient interstation spacing cannot be provided to allow a 6 kilowatt operation on Channel 231A, whereas using her present Channel 286A, adequate spacing can be achieved. Operation of such a facility at Roanoke would provide service, according to Selby, to 258,339 persons. On the other hand, if the facility were restricted to operation at 3 kilowatts, it would provide service to only 70,305 persons, with a deleterious effect on the ability of Selby's station to serve the public and on its competitive posture relative to other stations. Selby argues that Midwest's filing of its counterproposal prior to adoption of the Class A power increase to 6 kilowatts still makes it subject to any rule or policy changes that occur prior to the *grant* of such proposal. Selby cites *Noncommercial FM Stations*, 65 RR 2d 490 (1988), for the proposition that changes in the Commission's rules that occur before an allotment proposal is granted do not insulate the proponent from the effects of those rules. Selby further argues that the "6 kw rules at issue here went into effect long prior to the proposed grant of [Midwest's] counterproposal [and that] the Commission must protect Selby's rights as they existed on the effective date of those rules, October 2, 1989." Selby concludes that the Commission's procedures were not followed and, thereby, her rights were not protected since the counterproposal did not specify an "equivalent" channel as a replacement for Channel 286A at Roanoke.

5. In response to the *Show Cause Order*, Midwest stated its willingness to reimburse CPB for "its legitimate, prudent and reasonable costs associated with the change in frequency" of CPB's Station WIFF(FM), Auburn, Indiana, from Channel 288A to Channel 272A (which change the Commission had already ordered so as to accommodate the allotment of Channel 288A to Lagrange). Midwest notes that there are now pending three applications to operate on Channel 288A at Lagrange[7] and that Midwest

will seek partial reimbursement from the successful permittee. Accordingly, Midwest requests that this *Second Report and Order* require the eventual Lagrange permittee to reimburse Midwest *pro rata* for Midwest's costs of reimbursing CPB for changing the channel of its Station WIFF(FM) from Channel 288A to Channel 272A. Midwest also reiterates its willingness to reimburse Selby for the reasonable costs incurred in changing the channel of her proposed station at Roanoke from Channel 286A to Channel 231A.

6. CPB responded to the *Show Cause Order* by reiterating a position set forth in earlier-filed supplemental comments that are attached to its response here.[8] CPB alleged then that the replacement Channel 272A for Station WIFF(FM), Auburn, Indiana, was no longer equivalent to existing Channel 288A because the decision of the Commission to allow some Class A FM stations to increase power would permit an increased 6 kilowatt operation on Channel 288A. According to "studies" by CPB's consulting engineers that were not included with its supplement, operation on Channel 272A does not afford "equivalent opportunities" for an increase in its station's present 3 kilowatt facilities. CPB argues in effect that its agreement eight years earlier, under MM Docket 81-61, that it would vacate Channel 288A in lieu of replacement Channel 272A, was superceded by the "changed circumstances" of the Commission's authorization of the 6 kilowatt power increase. Consequently, CPB requests that it be permitted to continue to operate on Channel 288A.

7. In replying to Midwest's response, Selby reiterates her opposition to the substitution of Channel 231A at Roanoke because she claims that the channel is not equivalent to her present Channel 286A. However, she requests that, in the event that the substitution is granted, Midwest be ordered to reimburse Selby for costs beyond those routinely contemplated to include the loss in value of her proposed station -- the "difference in the appraised value of Selby's facility as a 3 kilowatt station and as a 6 kilowatt station, as determined by a reputable media brokerage firm."[9]

8. Midwest, in replying to Selby's and CPB's responses to the *Show Cause Order*, argues that neither has merit and that Midwest's proposal to upgrade its Station WQTZ(FM) should be granted. Midwest first notes that Selby's contention that the replacement Channel 231A is not equivalent to her present Channel 286A is based on the faulty premise that application grants subsequent to the adoption of the Class A power increase would qualify for such increase. Midwest noted that its counterproposal was submitted more than a year prior to the cutoff date for processing allotment proposals in accord with the 3 kilowatt minimum interstation spacing provisions -- as was expressly provided for in Docket No. 88-375 authorizing the Class A power increase. Channel 231A, states Midwest, complies with these spacing provisions at the site as authorized in Selby's construction permit and at the proposed site in her application to modify that permit.

9. Midwest argues alternatively that even if Selby's proposed operation were analyzed under 6 kilowatt spacings, according to Midwest's attached engineering study, Selby could still achieve 6 kilowatt operation on Channel 231A from the site specified in her construction permit by utilizing a non-directional operation pursuant to Section 73.215 of the Rules. Further, Midwest contends there is a significant area for fully spaced 6 kW operation on Channel 231A at other sites. Finally, Midwest notes that the site specified in Selby's pending application, from which she claims she cannot operate at 6 kilowatts, is a mere site preference and cannot act as a bar to Midwest's upgrade proposal, citing *Battle Ground, Indiana*, 4 FCC Rcd 5675 (1989), *Andalusia, Alabama*, 49 Fed. Reg. 32201 (August 13, 1984), and *Greenville, Texas*, 5 FCC Rcd 1263 (1990). Moreover, Midwest asserts that there is no assurance that Selby's application for 3 kW operation at that site would even be granted, particularly in light of her acknowledgment that the Federal Aviation Adminstration ("FAA") has serious concerns with electromagnetic interference at the applied-for site.

DISCUSSION

10. After consideration of the responses to the *Show Cause Order*, we believe that the public interest would be served by substituting Channel 286B1 for Channel 224A at Decatur, Indiana, and modifying the license for Station WQTZ(FM) to specify the higher class channel because this will result in an expanded area FM service for Decatur. As will be explained below, we believe Selby has not shown sufficient cause why her presently authorized Channel 286A at Roanoke should not be replaced with Channel 231A.

11. To begin with, the *Second Report and Order* in Docket 88-375 expressly stated that rule making petitions filed prior to October 2, 1989, would be processed in accordance with the rules then in effect -- the spacing requirements for 3 kilowatt maximum Class A stations.[10] In the *Show Cause Order*, we reiterated this point.[11] Since Midwest submitted its counterproposal on August 19, 1988, it is entitled to be processed under the pre-October 2, 1989, rules.[12] As we indicated in the *Show Cause Order*, Channel 231A meets these spacing requirements from either the site authorized in Selby's construction permit or from the site proposed in her pending application. Therefore, substituting Channel 231A for Channel 286A will not violate the applicable minimum distance separation requirements.

12. Moreover, contrary to Selby's contention, we believe that Channel 231A is equivalent to Channel 286A at Roanoke for allotment purposes. We consider channels of the same class to be equivalent unless showings have been made that a station cannot be constructed for reasons such as environmental consequences or air hazards. *See Vero Beach Florida*, 3 FCC Rcd 1049 (1988), *rev. denied*, 4 FCC Rcd 2184, 2185 (1989). No such showings were made in this proceeding. On the contrary, it appears that substituting Channel 231A for Channel 286A would enable Selby to operate Station WQTX(FM) with the same facilities that it is currently authorized (*i.e.*, maximum effective radiated power of 3 kW) at either the site specified in its construction permit or the site specified in its pending minor change application.[13]

13. As to Selby's request that we order Midwest to reimburse her for the costs of changing frequencies to include the difference in value between her station operating on 3 kilowatts and as a 6 kilowatt station, such a request too has no merit. To honor her request would have us recognize the applicability of 6 kilowatt spacings to Selby's station -- a recognition that would be both inconsistent and contradictory to what we have decided above. Moreover, such an interpretation goes well beyond Commission policy for reimbursement. As set forth in

Circleville, Ohio, 8 FCC 2d 159 (1967), a party such as Midwest which is benefiting from another station changing its channel, is required to reimburse that station for the reasonable costs associated with the channel change. A change in a station's market value is not such a cost that we have permitted under our reimbursement policy. Moreover, unlike a fixed cost involved in changing channels, the value of a station that has not actually been sold is speculative, making it difficult to use that as a basis for permitting reimbursement.[14]

14. CPB's comments were unsolicited as per the *Show Cause Order*, which stated that it "does not afford additional opportunity either to comment on the merits of the proposals set forth in the *Notice* or the proposal advanced in [Midwest's] timely counterproposal . . . " Moreover, these comments go directly to the merits of the counterproposal. They are, therefore, procedurally defective vis-a-vis the *Show Cause Order*. However, even if we were to consider them on the merits, they do not justify permitting Station WIFF(FM) to remain permanently on Channel 288A at Auburn. First, Station WIFF(FM) was ordered in Docket 81-61 to move to Channel 272A to accommodate a new FM allotment at Lagrange. They have only stayed on that channel because there was no longer a permittee at Lagrange who could reimburse them for the costs of changing channels. This situation has now been rectified by Midwest's commitment to provide reimbursement. Second, the channels being substituted are equivalent for allotment purposes. The channels are of the same class and permit Station WIFF(FM) to operate with the same maximum power that it can currently operate with (*i.e.*, 3 kW).

15. In view of the above considerations, we believe that the public interest would be served by the substitutions of Channel 286B1 for Channel 224A at Decatur, Indiana, Channel 224A for Channel 230A at Berne, Indiana, and Channel 231A for Channel 286A at Roanoake, Indiana, with the latter two substitutions being necessary to accommodate the Decatur upgrade. As indicated in the *Order to Show Cause*, Channel 286B1 can be allotted to Decatur consistent with the minimum distance separation requirements of the Commission's Rules provided the transmitter is sited at least 20.1 kilometers (12.5 miles) northwest of the community.[15] Likewise, the substitution at Berne requires a site restriction at least 2.5 kilometers north of the community.[16] The substitution at Roanoke can be accomplished at Station WQTX(FM)'s construction permit site or at its application site.[17] Furthermore, we will modify the license of Station WQTZ(FM), Decatur, Indiana, to specify operation on Channel 286B1 in lieu of Channel 224A pursuant to the provisions of Section 1.420(g)(3) of the Commission's Rules.[18] In addition, the applicant for a new FM station at Berne, Indiana, may amend his application (File No. BPH-881221MM) to specify Channel 224A in lieu of Channel 230A without loss of "cut-off" protection. *See Marion, MS*, 4 FCC Rcd 3720 (1989). Finally, as requested by LCBC, we will substitute Channel 262A for Channel 261A at Angola, Indiana, and modify the license for Station WLKI(FM) to specify the alternate channel.[19, 20]

16. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 11, 1991** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

Community	Channel No.
Angola, Indiana	262A
Berne, Indiana	224A
Decatur, Indiana	286B1
Roanoke, Indiana	231A

17. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WLKI(FM), Angola, Indiana, IS MODIFIED to specify operation on Channel 262A, in lieu of Channel 261A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the license for Station WLKI(FM), except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for modification of construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license File No. BLH-900507KC except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

18. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit (File No. 881221MG) for Station WQTX(FM), Roanoke, Indiana, held by Judith A. Selby IS MODIFIED to specify operation on Channel 231A, in lieu of Channel 286A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the construction permit for WQTX(FM), except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for modification of construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit (File No. 880107MG), except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

19. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WQTZ(FM), Decatur, Indiana, IS MODIFIED to specify operation on Channel 286B1, in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

20. IT IS FURTHER ORDERED, That the ultimate permittee for Channel 288A at Lagrange, Indiana, reimburse Midwest Communications Company *pro rata* for the costs of its reimbursement of C.P. Broadcasters, Inc. for its reasonable costs of changing the frequency of its Station WIFF(FM) at Auburn, Indiana, from Channel 288A to Channel 272A.

21. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Second Report and Order*, to the following:

Lake Cities Broadcasting Corporation, licensee of Station WLKI(FM), North Wayne Plaza, Angola, Indiana 46703;

Robert Alan Weaver, applicant for Channel 230A, Berne, Indiana, 510 West Main Street, Portland, IN 47371;

Judith A. Selby, permittee of Station WQTX(FM), P.O. Box 3252, Skokie, IL 60076;

Midwest Communications Company, licensee of Station WQTZ(FM), 233 North Second Street, Decatur, Indiana 46733

Applicants for Channel 288A at Lagrange, Indiana:

Cross Communications, Inc., P.O. Box 227, Lagrange, Indiana 46761; Lagrange County Broadcasting Company, 1322 Homewood Lane, Annapolis, Maryland 21401; Northern Indiana Broadcasters, Inc., Old Chicago Road, Michigan City, Indiana 46360.

(By regular mail to) C.P. Broadcasters, Inc., Station WIFF(FM), 5446 CR 29, Auburn, IN 46706;

Applicants for Channel 287A at Brooklyn, Michigan:

Geological Technology, Inc., 261 East Chicago Street, Jonesville, MI 49250; Brooklyn Radio Partners, P.O. Box 11101, Lansing, MI 48901;

Lauren A. Colby, 10 E. Fourth Street, P.O. Box 113, Frederick, Md. 21701 (Counsel for John M. Salov, petitioner for reconsideration of the *First Report and Order* in this proceeding).

22. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

23. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] LCBC subsequently withdrew its modification proposal for Channel 287B1 and has instead requested consideration of Channel 262A at Angola.

[2] Selby and Richard A Sterling also filed Joint Comments and a Further Counterproposal to Midwest's counterproposal. However, since this filing violated Section 1.420(d) of the Commission's Rules, we stated in the *Show Cause Order* that it will not be considered. *See* 5 FCC Rcd at 2001 n.6.

[3] Midwest's counterproposal also requires the substitution of Channel 272A for Channel 288A at Auburn, Indiana, and modification of the license for Station WIFF(FM) to specify the new channel. However, the Auburn channel change had already been ordered by the Commission in Docket 81-61.

[4] 4 FCC Rcd 7093 (1989). Although a petition for reconsideration of the *First Report and Order* is pending, the petition seeks relief which does not affect the outcome of the remaining proposals in this proceeding. Specifically, the petitioner, a former applicant at Hudson, Michigan, seeks cut-off protection status to Channel 273A which was allotted to Hudson in the *First Report and Order*.

[5] CPB advises that it has delayed its move to Channel 272A -- which was ordered in Docket 81-61 to accommodate the allotment of Channel 288A at Lagrange, Indiana -- until a new construction permittee is selected in lieu of the cancelled permittee at Lagrange. CPB awaits such selection so that the new permittee may reimburse CPB for its reasonable costs attendant to the frequency change from Channel 288A to Channel 272A.

[6] *See Second Report and Order* in MM Docket 88-375, *Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations*, 4 FCC Rcd 6375 (1989).

[7] The three applicants are: Cross Communications, Inc., BPH-880707MK; Lagrange County Broadcasting Company, BPH-880707MI; and Northern Indiana Broadcasters, Inc., BPH-880707MG.

[8] In the *Show Cause Order* we declined to consider these comments because they were filed approximately 15 months after the "cut-off" date specified for filing comments in this proceeding in contravention of Section 1.415(d) of the Commission's Rules, and because they constituted a late-filed counterproposal in violation of Section 1.420(d) of the Rules.

[9] Selby states that she expects that "such funds shall be placed in escrow" by Midwest to insure their prompt availability for reimbursement prior to the time when she makes any technical modifications to her station.

[10] 4 FCC Rcd at 6382.

[11] 5 FCC Rcd at 2002 n.11.

[12] *Noncommercial FM Stations*, *supra*, cited by Selby to support her contention that counterproposals made prior to the adoption of 6 kilowatt rules are still subject to those rules, in fact deals with an instance when the Commission, contrary to what was done in Docket 88-375, did not set a cutoff date when the old rules would no longer be applicable, but instead made all pending allotment proposals subject to the new rules. The case supports the proposition that the Commission may utilize rule making for the orderly conduct of its business, which may include or exclude consideration of pending proposals, or establishment of effective dates for new rules or policies when such proposals would no longer be considered.

[13] We also note that Selby has not taken any affirmative steps to seek 6 kW operation for Station WQTX(FM). No application for 6 kW operation is on file for Station WQTX(FM), which makes her argument about 6 kW operation speculative. Furthermore, while Station WQTX(FM) would be short-spaced under the new spacing rules to Station WIBM-FM, Channel 231B, Jackson, Michigan, Section 73.215 of the Commission's Rules may permit non-directional 6 kW operation on Channel 231A from her construction permit site. In addition, Midwest contends that there is a significant area (96 square kilometers) for fully spaced 6 kilowatt operation by Station WQTX(FM) on Channel 231A.

[14] We will, however, grant Midwest's request that the ultimate permittee for Channel 288 at Lagrange, Indiana, share in the reimbursement costs associated with Station WIFF(FM), Auburn, Indiana, changing from Channel 288A to Channel 272A. Since both Midwest and the party that obtains the construction permit at Lagrange will benefit from Station WIFF(FM) changing channels, they should share in the reimbursement costs. *See, e.g., York, Alabama*, 4 FCC Rcd 6923 (1989). Therefore, the eventual permittee for Channel 288 at Lagrange will be required to reimburse Midwest *pro rata* for the costs involved in the Auburn station changing channels.

[15] The coordinates for Channel 286B1 at Decatur are 40-58-33 and 85-04-23.

[16] Coordinates used for Channel 224A at Berne are 40-40-46 and 84-57-17.

[17] The coordinates specified in Station WQTX(FM)'s construction permit for Channel 286A at Roanoke are 40-55-00 and 85-27-30. The coordinates specified in its pending application for modification of construction permit (BMPH-890711IC) are 40-59-54 and 85-15-58.

[18] Although Midwest requested a "nonadjacent channel upgrade," it is being treated under the provisions of Section 1.420(g)(3) of the Commission's Rules because the proposal constitutes an "incompatible channel swap." *See Modification of FM Broadcast Licenses to Higher Class Co-channels or Adjacent Channels*, 60 R.R. 2d 114, 120 (1986).

[19] Coordinates used for Channel 262A at Angola are 41-40-51 and 85-00-02. Since the Angola, Berne, Decatur, and Roanoke allotments are all located within 320 kilometers (199 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been received.

[20] Because these allotments result from petitions filed prior to October 2, 1989, Station WQTZ(FM), Decatur, may avail itself of the provisions of Section 73.213(c)(1) with respect to Station WLSR, Channel 285A, Lima, Ohio, at coordinates 40-43-21 and 84-05-04. Likewise, Station WQTX, Roanoke, may utilize Section 73.213(c)(1) with respect to Station WIBM, Channel 231B, Jackson, Michigan, at 42-23-32 and 84-40-00. The eventual permittee at Berne may use the spacings set forth in Section 73.213(c)(1) with respect to Station WZWZ, Channel 224A, Kokomo, IN, at 40-28-18 and 86-09-52 and to Station WGTZ, Channel 225B, Eaton, Ohio at 39-50-10 and 84-24-16. Finally, Station WLKI, Angola, may avail itself of the provisions of Section 73.213(c)(1) with respect to Station WNIC, Channel 262B, Dearborn, MI, at 42-23-22 and 83-08-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-26

In the Matter of

Amendment of Section 73.202(b),	RM-7585
Table of Allotments,	
FM Broadcast Stations.	
(Hempstead, Texas)	

NOTICE OF PROPOSED RULE MAKING

Adopted: February 5, 1991; Released: February 25, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Farmers Communications ("petitioner") proposing the allotment of Channel 287A to Hempstead, Texas, as the community's first local FM service. Petitioner states that it will apply for this channel, if allotted.

2. We believe that petitioner's proposal warrants consideration because the proposed allotment could provide a first local FM transmission service to Hempstead, Texas. A staff analysis shows that Channel 287A can be allotted to Hempstead in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.9 kilometers (8.6 miles) northwest. This will avoid a short-spacing to Station KHCB(FM), Channel 289C, Houston, Texas.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hempstead, Texas	---	287A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 18, 1991,** and reply comments on or before **May 3, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Shaun A. Maher, Esq.
Blair, Joyce & Silva
1825 K Street, N.W.
Suite 510
Washington, D.C. 20006
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 287A at Hempstead are 30-11-25 and 96-10-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-27

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Castle Rock, Washington)	RM-7549

NOTICE OF PROPOSED RULE MAKING

Adopted: February 4, 1991; Released: February 25, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Cowlitz Broadcasting Company ("petitioner") proposing the allotment of Channel 296C3 to Castle Rock, Washington, as the community's first local FM service. Petitioner states that it will apply for this channel, if allotted.

2. Channel 296C3 can be allotted to Castle Rock in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.4 kilometers (6.5 miles) north.[1] This site will avoid short-spacings to the site specified in the construction permit for Station KMXI, Channel 294C, Lake Oswego, Oregon, as well as Channel 296C1, Sweet Home, Oregon. Since Castle Rock, Washington, is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

3. In view of the fact that Castle Rock, Washington could receive its first local FM service, we believe the public interest would be served by proposing the allotment of Channel 296C3 to that community. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Castle Rock, Washington	---	296C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 18, 1991,** and reply comments on or before **May 3, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Cowlitz Broadcasting
c/o Victoria A. Lord
13313 SE 208th Street
Kent, Washington 98042
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 296C3 at Castle Rock are 46-22-10 and 122-55-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-210

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Odem, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 4, 1991; Released: February 25, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 4904 (1989), proposing, *inter alia*, the reclassification of Channel 252A, Station KKHQ(FM), Odem, Texas, to Channel 252C3 and modification of the license of Station KKHQ(FM) accordingly. Capri Spanish Broadcasting, Inc. ("Capri"), licensee of Station KKHQ(FM), filed comments expressing interest in the proposed upgrade of its facilities and stating its intention to file an application for the higher channel, if allotted. The Federal Aviation Administration ("FAA") also filed comments.[1]

2. We believe the public interest would be served by the substitution of Channel 252C3 for Channel 252A at Odem, since it could provide the community with a wide area FM broadcast service. As indicated in the *Notice*, Channel 252C3 can be allotted to Odem consistent with the Commission's spacing requirements at petitioner's current transmitter site.[2] Since Odem, Texas is located within 320 kilometers (199 miles) of the U.S. - Mexican border, the concurrence of the Mexican government has been obtained. The application for Channel 252C3 at Odem must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding protection to the Commission's monitoring station at Kingsville, Texas. We will also authorize a modification of Capri's license for Station KKHQ(FM), Channel 252A, Odem, to specify operation on Channel 252C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Odem, Texas	252C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KKHQ(FM), Odem, Texas IS MODIFIED to specify operation on Channel 252C3 in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The FAA filed comments concerning this docket and other dockets initiated simultaneously. *See* 5 FCC Rcd 2152 (1990). The FAA's concerns will be treated consistent with the treatment afforded in other proceedings. 5 FCC Rcd 2152, n.4.

[2] The coordinates for Channel 252C3 at Odem, Texas, are 27-53-31 and 97-30-11.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PZ ENTERTAINMENT PARTNERSHIP, L.P.

For Modification of Facilities of Station KBBL(TV), Big Bear Lake, CA — File No. BMPCT-880915KF

For Construction Permit for a New Television Booster Station near Fawnskin, CA — File No. BPUB-880927NC

For Extension of Construction Permit For Station KBBL(TV) — File No. BMPCT-890330KF

MEMORANDUM OPINION AND ORDER

Adopted: February 11, 1991; Released: February 26, 1991

By the Commission:

1. The Commission has before it for consideration: (a) the above-captioned applications of PZ Entertainment Partnership, L.P. (PZ) for modification of the facilities of unbuilt Station KBBL(TV), Channel 59, Big Bear Lake, California, for a construction permit for a new television booster station to operate on the same channel near Fawnskin, California, and for extension of time to construct the television station; (b) an informal objection to the modification application, filed by Gulf-California Broadcast Company, Inc. (Gulf), the licensee of Station KESQ-TV (Channel 42, ABC), Palm Springs, California; and (c) related pleadings.

BACKGROUND

2. The community of Big Bear Lake lies in a deep, narrow valley that is surrounded by mountains rising between 2,000 and 4,000 feet above the valley floor. The valley is encompassed by the San Bernardino National Forest, which is under the jurisdiction of the U.S. Forest Service. In 1984, the Mass Media Bureau amended the Television Table of Assignments to add a new Channel 59 as the first television channel to Big Bear Lake. *Amendment of Table of Assignments (Big Bear Lake, CA)*, MM Docket No. 83-835, Mimeo No. 3543 (MMB, released April 16, 1984). On August 2, 1985, the staff granted the application of Felice-Tec, predecessor to Inland Empire Broadcasting Corporation (Inland), for the new channel in Big Bear Lake. The permittee proposed to construct a tower 467 feet above ground on Sugarlump Mountain, approximately five miles southeast of Big Bear Lake, and proposed effective radiated visual power of 5000 kW. The Forest Service later opposed the construction of a high-powered broadcast facility on Sugarlump Mountain, which is located in the San Bernardino National Forest. Indeed, in its November 3, 1987, application for additional time to construct the station, Inland informed the Commission that it was "faced with the anomalous situation where any site requires Forest Service approval and the Forest Service has not cooperated in attempting to resolve this problem." Ultimately, Inland concluded that it would be unable to construct the station as proposed and decided to assign the construction permit to PZ.

3. Having acquired the station on April 29, 1988, PZ soon faced the problem that had plagued Inland and, as a result, commissioned a survey of alternate sites. Dozens of potential locations were investigated, 14 of which were analyzed in greater detail utilizing 12 different criteria, one of which was line-of-site coverage of Big Bear Lake. All 14 sites are to the west or south of Big Bear Lake, toward the more populous San Bernardino and eastern Los Angeles suburbs, but none of the sites would allow a station at maximum facilities to provide line-of-sight coverage to Big Bear Lake. Ten of the sites are located in the San Bernardino National Forest and would likely prompt Forest Service opposition. Other sites were rejected because they are undeveloped, and their use would necessitate the construction of power lines and access roads across Forest Service land. Additionally, PZ rejected sites in the valley area because it would be unlikely that a 2000-foot tower would be approved in order to furnish coverage to a major portion of the station's authorized coverage area. After considering all the possibilities, PZ decided to utilize the privately owned Little San Gorgonio Peak, approximately ten miles south of Big Bear Lake. That peak is relatively level and currently serves as a privately developed communications site but would not afford line-of-sight coverage of Big Bear Lake. Accordingly, PZ filed a modification application and requested waiver of Section 73.685(b) of the Commission's Rules concerning transmitter location and principal community coverage. PZ states, however, that use of the site would provide an excellent signal to the San Bernardino area and that it proposes to provide a city-grade signal to Big Bear Lake itself through the use of an on-channel television booster on Bertha Peak, west of Big Bear Lake.

PLEADINGS OF THE PARTIES

4. *Gulf's Informal Objection.* On February 10, 1989, Gulf filed its informal objection to the modification application, in support of which it argues that PZ had not demonstrated the unavailability of sites which comply with the Commission's Rules or which would necessitate less extensive waivers. Specifically, Gulf asserts that PZ had not considered extensive areas to the north and northeast of the San Bernardino National Forest for the location of its transmitter. In that connection, Gulf identifies a potential site in that area which allegedly would provide line-of-sight to nearly all of Big Bear Lake with an approximately 980-foot tower. Additionally, Gulf maintains that PZ had not shown that the Forest Service would disallow use of the authorized Sugarlump Mountain site at a lower power. Gulf further contends that grant of the proposed site on Little San Gorgonio Peak would eliminate authorized service from unserved and underserved areas. Gulf also argues that PZ's proposal

would subvert Section 307(b) of the Communications Act and the Television Table of Assignments by improperly diluting service to Big Bear Lake. In that regard, Gulf asserts that city coverage requirements have taken on added significance since the Commission abolished its *de facto* reallocation policy in 1983 and expressly made city coverage one of the factors considered in determining compliance with our licensing rules. Finally, Gulf notes that PZ had leased studio and office space in Palm Springs and questions PZ's intentions to serve its authorized community.

5. *PZ's Opposition*. In opposition, PZ reiterates that the Forest Service will not approve use of the San Bernardino National Forest, including Sugarlump Mountain, for high-powered broadcast operation and submits the February 27, 1989, letter of Susan Odell, District Ranger of the Big Bear Ranger District in support of that contention. Further, PZ rejects the hypothetical site suggested by Gulf because: a) line-of-sight coverage of Big Bear Lake would not be feasible; b) the site is so remote that access and a power supply would be impractical; c) the terrain is too rugged to make construction feasible; and d) a facility at that site would be terrain-blocked from approximately 90 percent of the population in the authorized service area. PZ also argues generally that it would be economically unfeasible to operate the station with effective radiated power of as low as 100 watts from Bertha Peak, a low-powered communications site in the San Bernardino National Forest. PZ admits that grant of its proposal will result in some loss areas, but it contends that the losses would be restricted to the Mojave Desert with a relatively small population. Finally, PZ reiterates that it will maintain its main studio in Big Bear Lake and will provide a principal-community signal with its booster facility. It does, however, state that it "could be expected to have an office in Palm Springs." PZ further notes that television viewers in Big Bear Lake will not notice any discernible difference as a result of the grant of PZ's proposal. Finally, PZ asserts that Gulf's objection is based solely on its desire to avoid another competitor in the market and not on any public interest reasons.

6. *Gulf's Reply*. In response, Gulf argues that PZ did not attempt to demonstrate why complying with the rules in this case would be economically infeasible. Gulf notes that, while the permanent population of the valley is only 16,000, Big Bear Lake is a year-round tourist area with overnight weekend population reaching 150,000. Gulf further contends that the unavailability of power or roads at the potential site it suggested should not disqualify the site from consideration, since that is precisely the situation on Little San Gorgonio Peak, where PZ proposes to locate its tower. Gulf reiterates PZ's failure to consider areas to the north and east of Big Bear Lake and suggests another site at Onyx Peak that has a power supply and road access.[1]

7. *Staff Request for Additional Information*. On December 15, 1989, the staff requested additional information from PZ in support of its waiver request. Specifically, the staff asked PZ to: (1) obtain Forest Service clarification as to the reason it opposed location of the station's transmitter on Sugarlump Mountain; (2) make a comprehensive showing as to the unavailability of sites from which line-of-sight could be provided to Big Bear Lake; (3) provide information concerning whether other sites could provide service comparable to that currently authorized; (4) provide an economic showing as to the feasibility of locating the facility on the valley floor; (5) demonstrate that the proposal is consistent with Section 307(b) of the Communications Act; and (6) provide information as to the proposed gain and loss areas.

8. *PZ's Response*. PZ submitted a comprehensive response to the staff's letter on March 1, 1990, which included two engineering surveys and one economic feasibility study. PZ also attaches a letter dated January 22, 1990, from District Ranger Rebecca Aus, in which she states that Bertha Peak is the only site available for broadcast transmission use in the Big Bear Ranger District of the San Bernardino National Forest. She adds, however, that facilities on Bertha Peak are limited to a maximum of 1000 watts effective radiated power and a maximum height of 40 feet. PZ therefore concludes that Forest Service land would be unavailable for use by a full power station. That essentially leaves three other areas in which a transmitting tower could be located -- on the valley floor, in one of the several privately owned parcels of land totally encompassed by the National Forest, or on land beyond the boundaries of the National Forest.

9. With respect to locating a tower on the valley floor, PZ notes that Federal Aviation Administration (FAA) regulations impose height limitations of 200 feet within three miles of an airport and 500 feet within six miles. In addition, the City of Big Bear Lake has its own height limit of 150 feet. According to PZ, the 500-foot restriction would affect virtually the entire valley, and there do not appear to be any structures in the valley in excess of that height. Even if it could utilize a 500-foot tower on the valley floor, PZ states that it would still fall far short of being able to provide a signal outside the valley. In that connection, PZ submits an economic analysis of operating the station with a service area confined to the valley floor. The study shows that, while the station would be located in the Los Angeles television market, the station would reach less than one-tenth of one percent of the population in that market. As a result, PZ argues that the station, which would not be a network affiliate, could expect virtually no regional or national advertising revenues. The study estimates that, at best, the station could generate $450,000 in revenues per year, but annual expenditures would be between $850,000 and $1,500,000. The study therefore concludes that there is no scenario under which the station could be viable under such circumstances. PZ adds that the situation in Big Bear Lake is not comparable to other small television markets in the country, where most of the stations are network affiliates or VHF facilities or both.[2] Consequently, PZ concludes that transmitting from a tower on the valley floor would not be a practicable alternative.

10. In searching for other sites, PZ eliminated from consideration areas from which a tower in excess of 2000 feet would be required, since that, by definition, is presumed to constitute an air hazard by the FAA. A further limitation is the proximity of Station KVEA(TV), Channel 52, Corona, California, which precludes a KBBL site more than three miles west of Big Bear Lake because of the Commission's spacing requirements. PZ notes that, besides the valley itself, which it rejects, virtually the entire area remaining is land in the San Bernardino National Forest. The applicant states, however, that there are 12 small privately owned parcels of land encompassed by the National Forest, and PZ discusses -- and rejects -- the suitability of each. Additionally, PZ has considered the use of Bertha Peak (the site of the proposed on-channel booster station), which has been designated as a low pow-

er electronic site in the National Forest, and an area advocated previously by Gulf that is located at the northeastern boundary of the National Forest. The latter area was deemed unsuitable because it is located in the Bighorn Mountains Wilderness Study Area, and all permanent development there has been prohibited by the Bureau of Land Management since 1979. Bertha Peak was also eliminated from consideration because of Forest Service restrictions on height and power. Of the remaining 12 sites, PZ states that all are in areas designated Resource Conservation or Agriculture by the San Bernardino County government, which has imposed a land use restriction of 35 feet. Upon further investigation, it was found that eight of those sites would necessitate towers in excess of the 2000-foot maximum height allowed by the FAA in order to provide Big Bear Lake with line-of-sight service. PZ states that none of the privately owned sites have adequate power for a high-power television facility, and it asserts that all four of the remaining sites would require Forest Service approval for the erection of power lines through the National Forest. PZ further notes that Southern California Edison has estimated the cost of supplying power to these sites as being between three and four million dollars and requiring between one and two years to construct. Additionally, PZ argues that none of the four remaining sites have adequate access roads and that the Forest Service approval would be needed in that connection as well. Finally, PZ asserts that the proximity of the Pacific Crest National Scenic Trail would eliminate virtually all of the privately owned sites from consideration. As a result, PZ concludes that there is no site from which a station operating at maximum facilities could provide line-of-sight to Big Bear Lake. It therefore maintains that waiver of Section 73.685(b) of the Rules is warranted. PZ adds, however, that the proposed booster would provide line-of-sight service to Big Bear Lake.

11. In further support of its proposal, PZ argues that the circumstances of this case are similar to those in *WSTE-TV, Inc. v. F.C.C.*, 566 F. 2d 333 (D.C. Cir. 1977), where the Court directed the Commission to consider the use of translators to provide principal-community service to Fajardo, Puerto Rico, where the station's proposed transmitter site could not provide the required coverage due to rugged terrain. PZ contends that it has proceeded in good faith to find a site that would comply with the Rules and that its proposal is not an attempt to avoid Section 73.685(b) requirements. Consequently, it argues that the solution in *WSTE-TV, Inc.* be applied here as well.

12. In response to the staff's concern that PZ's proposal would be inconsistent with the requirements of Section 307(b) of the Communications Act, PZ asserts that, by adding the channel to the Television Table of Assignments, the Commission has already determined that the public interest would be served by establishing a full-power television station in Big Bear Lake. Its proposal, it asserts, is a means of achieving that end. PZ argues that Gulf improperly attempts to resurrect the Commission's *de facto* reallocation policy which was abandoned in 1983. *Suburban Community Policy, Berwick Doctrine, and De Facto Reallocation Policy*, 93 FCC 2d 436 (1983). PZ contends that, in that decision, the Commission affirmed several 307(b) considerations that apply here: (1) that television stations are intended to serve wide areas; (2) that a licensee is still required to provide responsive programming to its community of license; (3) that principal-community service to the community of license should be provided; and (4) that the threat of a renewal challenge for failure to provide programming responsive to the issues confronting the designated community provides the assurance of Section 307(b) compliance. In that connection, PZ reaffirms that it will locate its main studio in Big Bear Lake and that its programs will address the problems, needs, and interests of its community of license. PZ adds that it is not attempting to change transmitter locations to enhance its market size, and notes that approximately 130,000 persons in the predicted Grade B contour of the authorized facilities would no longer be in the station's proposed service area.[3] Rather, PZ argues that it was forced to change its site because of the Forest Service's decision. PZ admits that a low power facility could technically serve Big Bear Lake and the valley alone but that such service would frustrate the Commission policy of encouraging service to wide areas and would not be economically feasible. Additionally, PZ asserts that Big Bear Lake and the entire valley currently receive no off-the-air television signals and that its proposal is the only means of remedying that situation. Section 307(b), PZ argues, would therefore be served by the institution of this first service.

DISCUSSION

13. Section 307(b) of the Communications Act requires the Commission to make a "fair, efficient, and equitable distribution of radio service." For full-service television stations, this is accomplished through the establishment of the Television Table of Assignments, which allocates television channels to specific communities across the country. In many instances, however, such communities are located in relatively sparsely populated areas, and, to maximize service to the largest possible audience, broadcasters have often sought to locate their stations far from the listed city. Over the years, several policies were developed to assure a licensee's primary attention to its community of license, including the *de facto* reallocation policy, which prevented licensees from abandoning smaller communities of license for larger nearby cities. In 1983, however, the Commission abolished these policies after determining that they had a tendency to frustrate competition. *Suburban Community Policy, Berwick Doctrine, and De Facto Reallocation Policy*, 93 FCC 2d 436 (1983), *recon. denied*, 56 RR 2d 835 (1984). In doing so, however, the Commission announced that its action did not excuse an applicant from complying with its other rules and put a heavier burden on an applicant to do so:

> In the future, we will examine applications to determine compliance with our licensing rules. If that exists, we will presume the licensee intends to serve the community designated. Compliance with the rules [as well as Section 307(b) of the Communications Act] will result in the requisite signal to the community of license, location of the main studio in that community and a programming proposal that will serve the needs of the community of license. Abolition of this policy [*de facto* reallocation] does not mean that we will countenance subversion of our rules or the Tables [of Assignment].

Id. 93 FCC 2d at 456. In 1987, the Commission further amended its rules to allow a licensee to locate its main studio anywhere within the station's principal community contour. *Main Studio and Program Origination Rules*, 2 FCC Rcd 3215 (1987). As a result of this action, the provision of the requisite signal to the community of license, as defined in Section 73.685 of the Rules, has taken on added significance.

14. The relevant portions of Section 73.685 reveal three components -- two mandatory and one admonitory. First, the rule requires the selection of a transmitter site that, on the basis of the effective radiated power and antenna height employed, will result in a minimum field strength of 80 dBu over the entire community of license for UHF television stations. The rule further suggests that the antenna "be located at the most central point at the highest elevation available. . . ." Finally, the rule requires that "the location should be so chosen that line-of-sight can be obtained from the antenna over the principal community to be served; in no event should there be a major obstruction in this path." Here, PZ's proposed primary transmitter would not even provide a Grade B (64 dBu) signal over Big Bear Lake, and there would be two major obstructions between the transmitter site and the community. PZ's proposal, therefore, is clearly deficient and is not comparable to other cases where the rule has been waived. Although Section 73.685 has been waived on several occasions, the shortfalls in signal intensity were generally minor,[4] and a waiver of the magnitude requested here is unprecedented. PZ claims that the situation before us is analagous to the circumstances in *WSTE-TV, Inc. v. F.C.C., supra*; however, in that case the licensee would have provided principal-community coverage to 78 percent of its city of license, and the use of translators was approved to furnish the signal to the other 22 percent. Here, PZ would provide no principal-community coverage at all and relies totally on the booster for the requisite signal.

15. Approval of PZ's proposal requires an assumption that it will satisfy the requirements of Section 307(b), and, as we have stated, the chief means by which we gauge compliance with our licensing procedures is the provision of the requisite signal to the community of license. Implicit in such a determination, however, is the assumption that the principal-community signal is being provided to the community of license by the main transmitter, without the benefit of a waiver of the Commission's Rules. Thus, while PZ proposes to furnish the requisite 80 dBu signal to Big Bear Lake, it intends to do so only by means of the booster, and such a secondary source cannot be relied on to demonstrate compliance with the rule or Section 307(b). In that connection, we have stated that "TV boosters function essentially as on-channel translators that fill in shadowed locations within a station's licensed service area. We do not believe that it is appropriate to broaden [that] definition." *FM Booster Stations and Television Booster Stations*, 2 FCC Rcd 4625, 4633 (1987).

16. Despite PZ's assertion that the requisite signal cannot be provided to Big Bear Lake without the assistance of boosters, we believe that it can if a lower power operation or a transmitter on the valley floor is specified. In response to the staff's December 15, 1989, letter for additional information, PZ submitted an extensive engineering showing that purports to demonstrate the unavailability of transmitter sites from which line-of-sight could be provided to Big Bear Lake. Even if maximum or near-maximum power is utilized from a site other than on the valley floor, it appears that line-of-sight could not be provided to Big Bear Lake. Most of the potential sites would be subject to strict height and power limitations imposed by the Forest Service, and it appears that the privately owned parcels identified by PZ would also be unavailable because of their remoteness, ruggedness, lack of utilities, environmental problems, or a combination of these factors. We disagree with PZ, however, as to the possibility of locating a lower power operation on the valley floor. PZ does not dispute the fact that such a facility would provide line-of-sight to all of Big Bear Lake. Rather, it argues that such a station would not be economically viable. The Commission, however, is not the guarantor of the financial success of its licensees. That is a judgment to be made by the applicants and the marketplace. As we stated in *Triangle Publications, Inc.*:

> we are not generally concerned with the competitive status of licensees and are not insurers of lucrative operations. . . . [A licensee's] private objective, then, is of little weight in the determination of the ultimate public interest.

Triangle Publications, Inc., 29 FCC 315, 318 (1960), *affirmed sub nom. Triangle Publications, Inc. v. F. C. C.*, 291 F. 2d 342 (1961). Moreover, when Channel 59 in Big Bear Lake was added to the Television Table of Allocations, there was no assurance that a station there would be economically viable and that was a matter for PZ to consider before acquiring the station. In this connection, we note that at the time PZ acquired the permit for station KBBL(TV), it was on notice that the station's authorized site would not be approved by the Forest Service.[5] Further, we believe it is inappropriate to use the potential profitability of a station as a basis for waiving compliance with our rules in an applications proceeding. To the extent that an applicant finds operation on an allotted channel not economically viable, the spectrum would then be available for reallotment. Although, as a general matter, we would like to provide some off-the-air television service to Big Bear Lake, we cannot waive our rules to permit such a major departure from our licensing standards solely on the economic grounds submitted by PZ.[6]

17. In addition, Gulf has raised several collateral issues that will be addressed briefly. First, Gulf alleges that PZ's petition to deny Gulf's license renewal application (BRCT-880729KI) was a "strike" petition filed solely as retribution for Gulf opposing PZ's application here. In that proceeding, PZ asserted that Gulf had asked other stations in the area to band together to oppose PZ's proposal here. We have stated that "we will not infer the existence of primary purpose to delay from the mere filing of a petition to deny, because a licensee who establishes 'standing' has a statutory right to bring to the Commission's attention public interest questions raised by a competitor's application." *Radio Carrollton*, 69 FCC 2d 1139, 1150-51 (1978), *clarified* 69 FCC 2d 424 (1978), *affirmed sub nom., Faulkner Radio, Inc. v. F.C.C.*, No. 79-1749 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981). In determining whether delay is a petitioner's primary purpose, we consider a number of factors, including: (1) statements by principals or officers of the licensee admitting an obstructive purpose; (2) the withholding of information relevant to a determination of the

issues raised; (3) the absence of any reasonable basis for the allegations raised in the petition to deny; (4) economic motivation indicting a delaying purpose; and (5) other conduct of the licensee. *Id.* 69 FCC 2d at 1151. While the staff did not concur in PZ's assessment of Gulf's conduct, we do not believe that its petition evidenced the factors set out above. Specifically, PZ's petition was not frivolous, and we find no intent on the permittee's part to deceive the Commission.[7] Consequently, we disagree with Gulf that a "strike" petition was filed.

18. Gulf further contends that the principals of PZ have participated in an unauthorized transfer of control of Station KADE(TV), San Luis Obispo, California. Gulf asserts that Riklis Broadcasting Company, L. P. (Riklis) Broadcasting)[8] has contracted to lease the facilities of KADE(TV) in order to retransmit the signal of its Oxnard, California station, KADY-TV on a simulcast basis. While Riklis Broadcasting does have an option to acquire the station, there has been no showing that there is anything more present than a programming agreement between two independently owned stations. We further reject both of Gulf's claims that PZ made misrepresentations to the Commission. Misrepresentation, both legally and conventionally, connotes a false statement of an objective fact intentionally made to deceive. Gulf first asserts that PZ misrepresents the ultimate location of the station as Big Bear Lake by stating that it intends to locate its main studio there. Gulf submits copies of various invoices and agreements to demonstrate that PZ has referred to KBBL as a Palm Springs station, and it notes that PZ intends to construct a studio-office complex there. The Commission's rules do not prohibit a station from identifying itself in commercial dealings as a station of a city other than its city of license, nor do they prohibit a station from establishing auxiliary studios in other cities. Consequently, we find no inconsistency between PZ's statement that its main studio will be in Big Bear Lake and the evidence offered by Gulf. Gulf further argues that PZ misrepresented its position by informing the Commission that its initial search for alternate sites was assertedly comprehensive when, in fact, it subsequently submitted new sites. It should be noted that the Commission's staff asked PZ to furnish a more extensive showing, and, while the further study did suggest different sites, PZ's conclusion was that none of them were available for the purposes desired. Consequently, from PZ's perspective, its showing only served to reinforce its previous conclusions. Because neither of these allegations suggest an intention to deceive the Commission, we cannot conclude that there is a substantial and material question of fact that PZ misrepresented facts to us. We therefore conclude that PZ is qualified to remain a Commission permittee. Further, in view of the time needed to consider fully the matters decided here, we believe that grant of the permittee's extension application is warranted.

19. Accordingly, for the reasons set out above, PZ's request for waiver of Section 73.685(b) of the Rules IS DENIED; its applications for modification of facilities and for a construction permit for the booster station ARE DENIED; and its extension application IS GRANTED for a period of six months from the release of this decision.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In a supplemental pleading, PZ notes that Gulf's suggestion of Onyx Peak assumes the use of a 1,475-foot tower. That, PZ argues, is technically infeasible. Further, PZ asserts that Onyx Peak would not provide line-of-sight service to all of Big Bear Lake, and the signal would bounce off the valley walls, thereby making the signal unusable.

[2] PZ asserts that, of the eleven smallest television markets in the country, the only one having an independent station is KOIA-TV, Ottumwa, Iowa, which reaches nearly five times as many television households as would KBBL(TV) if transmitting from the valley floor.

[3] Much of population in the proposed loss area resides in the eastern suburbs of Los Angeles and already receives multiple television signals. There are, however, approximately 41,000 persons in the proposed loss area who currently receive, at most, only one other off-the-air television service, 3,000 of which currently receive no such signals. PZ argues, however, that it is under no obligation to maintain service, since the station is not operational.

[4] For example, the Review Board waived Section 73.685(a) for a commercial television applicant on the ground of substantial compliance where the shortfall of principal-community coverage represented 2.9 percent of the city's area. *Pappas Telecasting, Inc.*, 52 RR 2d 1495 (Rev. Bd. 1983). *See also Vela Broadcasting Co.*, 63 RR 2d 1166 (Rev. Bd. 1987) (waiver granted where a proposed television applicant's principal-community coverage covered more than 99 percent of the area within the city's boundaries). In contrast, the Commission has denied a waiver of Section 73.685(a) where, among other things, the applicant's proposal failed to provide any principal-community coverage. *Coral Television Corp.*, 84 FCC 2d 438 (1981).

[5] BMPCT-871103KE; letter of December 15, 1987, from Forest Service District Ranger Susan L. Odell ("[A]s of this time, an approved electronics site for high power equipment does not exist on National Forest land in the Big Bear area."); letter of April 14, 1988, from counsel for PZ ("[E]ven before closing [PZ] has taken steps to determine the availability and suitability of alternative transmitter sites for the KBBL(TV) operation.").

[6] Big Bear Lake might benefit from a low power television station, which could survive on a substantially smaller economic base than a full-service station. In that regard, a filing window will be opened in the near future for the filing of low power television and television translator stations. We also note that more than 12,200 persons in the Big Bear Lake area now receive cable television service and that local radio service is available from stations KBBV(AM) and KTOT(FM).

[7] The staff disagreed with PZ's allegations in a decision dated July 5, 1990, but the renewal application remains pending for consideration of a petition questioning the applicant's compliance with the Commission's equal employment opportunity requirements.

[8] PZ is a limited partner of Riklis Broadcasting, which is the licensee of Station KADY-TV, Oxnard, California. Additionally, Riklis Enterprises, Inc. is the sole general partner of both PZ and Riklis Broadcasting.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-257

In re Applications of

LA STAR CELLULAR TELEPHONE COMPANY — File No. 27161-CL-P-83

For Construction Permit for Facilities operating on Block B in the Domestic Public Cellular Radio Telecommunications Service in the New Orleans, Louisiana MSA

and

NEW ORLEANS CGSA, INC. — File Nos. 29010-CL-P-83, 29181-CL-P-85

To amend its construction permit for facilities operating on Block B in the Domestic Public Cellular Radio Telecommunications Service, Call Sign KNK224, in the New Orleans, Louisiana MSA

MEMORANDUM OPINION AND ORDER

Adopted: February 12, 1991; Released: February 26, 1991

By the Commission:

1. Now before the Commission is an order of presiding Administrative Law Judge Joseph Chachkin denying the petition of United States Cellular Corporation (USCC) for leave to intervene in this proceeding, which involves mutually exclusive applications to provide cellular service to St. Tammany Parish in the New Orleans Metropolitan Statistical Area (MSA). *Memorandum Opinion and Order*, FCC 90M-2280 (Jul. 30, 1990).[1] USCC filed an interlocutory appeal of the denial of its petition to intervene pursuant to 47 C.F.R. § 1.301(a)(1) with the Review Board;[2] however, the Board referred this appeal to the Commission because the proceeding had been set for expedited hearing pursuant to 47 C.F.R. § 22.916(b). *La Star Cellular Telephone Company*, 5 FCC Rcd 5701 (Rev. Bd. 1990). Although we believe that the ALJ did not abuse his discretion by denying the request for intervention, for the reasons set forth below, we will make USCC a party to this proceeding.

2. To place USSC's request in context, it is necessary to provide some background concerning the applicants and the procedural history of this proceeding. Star Communications Co. (Star) and SJI Cellular, Inc. (SJI) have a joint venture, La Star Cellular Telephone Company (La Star), one of the two mutually exclusive applicants in this proceeding. [3] Star owns a 49% minority interest in La Star and SJI owns the 51% majority interest. All of the stock of Star is owned by USCC, which in turn is a subsidiary of Telephone and Data Systems, Inc. (TDS). The Commission's rules require that applicants for Block B licenses have a wireline presence in the MSA for which they are applying. SJI, the majority owner of La Star, has the requisite wireline presence; however, Star, the minority owner, USCC, and its parent TDS, do not. NOCGSA alleges that TDS, through Star, exercises *de facto* control over La Star. Because the applicant must be controlled by an entity with a wireline presence in the MSA, control of La Star was made a threshold issue in the order designating the applications for hearing. Resolution of the issue will determine whether La Star is eligible to apply for the Block B frequency in St. Tammany Parish. *See La Star Cellular Telephone Company*, 5 FCC Rcd 3286, 3289-90 ¶¶ 26-28, 33 (Hearing Designation Order 1990).

3. Based on the designation of the threshold issue, USCC filed a petition for leave to intervene. The ALJ found that USCC failed to demonstrate how its participation as a party would assist the Commission in the resolution of the threshold and comparative issues under consideration. The ALJ noted that the petition contained no showing that USCC will not be adequately protected or represented by the joint venture. The ALJ observed that in the absence of a showing of immediate or potential conflict, Star, USCC's subsidiary, and SJI, as joint venture partners, both have the same interest -- that is, to be awarded the license for the Block B Cellular system in St. Tammany Parish. The ALJ concluded that USCC, as a partner in the joint venture through its subsidiary, stands in the same position as a stockholder in a corporation, and cannot intervene unless it shows a divergent financial or economic interest from the joint venture itself, indicating that the joint venture will not adequately represent USCC's interests.

4. Pursuant to 47 C.F.R. § 1.223(b), a petition for leave to intervene must set forth the petitioner's interest in the proceeding and demonstrate how the petitioner's participation will assist the Commission in the determination of the issues in question. *See The Seven Hills Television Company*, 2 FCC Rcd 6867, 6889 ¶ 72 (Rev. Bd. 1987), *recon. dismissed*, 3 FCC Rcd 826 (Rev. Bd. 1988), *recon. denied*, 3 FCC Rcd 879 (Rev. Bd. 1988), *rev. dismissed*, 4 FCC Rcd 4062 (1989). The decision to permit intervention is within the presiding officer's discretion. *See Listener's Guild, Inc. v. FCC*, 813 F.2d 465, 470 (D.C. Cir. 1987). USCC asserts that its actions are relevant to the issue of control of La Star, and argues that any determination that USCC, as the sole owner of Star, has improperly assumed control of La Star could adversely affect USCC in other proceedings.

5. Based upon the showing made in USCC's petition for leave to intervene, the ALJ did not abuse his discretion by denying USCC party status. Nevertheless, we recognize that USCC and its parent, TDS, hold numerous other Commission licenses. Therefore, we agree that any Commission determination that USCC or its parent, TDS, controls La Star may be raised in other, subsequent proceedings. While the interests of Star and SJI are the same in this proceeding, without participation by USCC here, USCC or TDS would have the right to litigate any such

adverse finding in such a subsequent proceeding. Although the ALJ was correct that USCC did not show how its participation would assist the Commission in the resolution of this proceeding, in order to avoid further litigation on this issue in future proceedings, it would better serve the public interest to resolve the issue of control of La Star in this proceeding with USCC as a party.[4] *Cf. Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd _____ (December 21, 1990); *A. S. D. Answer Service, Inc.*, 47 Fed. Reg. 40896 (Hearing Designation Order 1982). In this regard, we find that USCC's participation will assist the Commission.

6. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.301(a)(1), the Appeal from the Denial of Petition for Leave to Intervene filed August 10, 1990 IS GRANTED, United States Cellular Corporation IS MADE a party to this proceeding with respect to the threshold control issues, and the Supplement to Appeal for Denial of Petition for Leave to Intervene and Request for Immediate Action filed August 15, 1990 by United States Cellular Corporation IS DISMISSED AS MOOT.[5]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now pending before the Commission are: Appeal from Denial of Petition for Leave to intervene filed on August 10, 1990 by United States Cellular Corporation; Supplement to Appeal from Denial of Petition for Leave to Intervene and Request for Immediate Action filed August 15, 1990 by United States Cellular Corporation; Response to Appeal and Supplement filed on August 17, 1990 by New Orleans CGSA, Inc.; Notification of Subsequent Development filed on October 2, 1990 by New Orleans CGSA, Inc.

[2] USCC requests that this appeal be considered even though it was not filed in a timely manner pursuant to 47 C.F.R. § 1.301(c)(2). USCC states that it did not receive a copy of the ALJ's *Memorandum Opinion and Order* denying its petition for leave to intervene and that the ALJ's action on its petition did not appear in a Commission *Public Notice*. NOCGSA interposes no objection to USCC's request. Accordingly, for good cause shown, we will consider the merits of USCC's appeal notwithstanding its untimeliness.

[3] NOCGSA has been granted interim operating authority for St. Tammany Parish pending a final decision in this proceeding. *See La Star Cellular Telephone Co.*, 4 FCC Rcd 3777, 3781 ¶ 30 (1989), *aff'd, La Star Cellular Telephone Co.*, 899 F.2d 1233 (D.C. Cir. 1990). Initially, the Commission granted NOCGSA's application to expand its geographic service area into St. Tammany Parish, after having dismissed La Star's competing application as untimely. *New Orleans CGSA, Inc.*, CC Mimeo No. 6904 (Mob. Ser. Div. Oct. 1, 1984); *aff'd*, FCC 85-209 (May 6, 1985). However, because the Commission had not provided adequate notice of the filing deadline, the United States Court of Appeals for the District of Columbia Circuit ordered the Commission to reinstate La Star's application *nunc pro tunc*. *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1560 (D.C. Cir. 1987).

[4] It is within the ALJ's discretion to allow USCC to make a further showing with respect to the threshold issue of control of La Star if it makes a proffer of substantial and significant new evidence. The permissibility of any further cross-examination will be governed by 47 C.F.R. § 22.916 (b)(6).

[5] In this regard, we note that USCC, in a supplement filed on August 15, 1990, reported that NOCGSA had filed a petition to enlarge issues against La Star, seeking the addition of a misrepresentation issue in connection with statements made in the joint venture agreement pertaining to control of La Star. However, as reported by NOCGSA in a pleading filed October 2, 1990, the ALJ denied NOCGSA's petition to enlarge issues; therefore, misrepresentation is not at issue. *See La Star Cellular Telephone Company*, FCC 90M-3036 (Sept. 26, 1990). The arguments raised in USCC's supplement to the instant appeal directed to NOCGSA's petition to enlarge issues are therefore moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-436

In re Application of

BIG COUNTRY COMMUNICATIONS (Assignor) File No. 23678-CD-P/L-01-86

and

PASS WORD, INC.
(Assignee)

For consent to the partial and assignment of the license of Public Land Mobile Service, Station KPD783, on 35.50 MHz at Sandpoint, Idaho

Appearances

Henry Soloman and *Benjamin J. Lambiotte* on behalf of Pass Word, Inc.; and *Gerald M. Zuckerman* on behalf of Chief, Common Carrier Bureau.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: February 14, 1991; Released: February 26, 1991

1. Pass Word, Inc. (Pass Word) seeks a ruling on a "Motion For Summary Decision." They filed their motion on January 17, 1991, and want the rehabilitation issue that has been specified against Rodney J. Bacon, President and 49.5 percent owner of Pass Word, resolved in their favor. *See* 55 F.R. 46866 published November 7, 1990. Pass Word supplemented its motion on January 22, 1991.

2. The only other party to the proceeding,[1] the Common Carrier Bureau commented on Pass Word's motion on January 30, 1991. The Bureau is " . . . satisfied that Pass Word has made a prima facie showing that it has been rehabilitated and is qualified to be licensed as a common carrier . . . " So, says the Bureau, " . . . we do not object to a grant of the motion . . . " So Pass Word's motion stands unopposed.

RULING

3. Pass Word's unopposed motion will be granted. There is no genuine issue of fact that needs to be heard. There is no dispute, the material facts are clear. The Bureau is correct. Pass Word has demonstrated that its principal Rodney Bacon has been rehabilitated, and is qualified to be licensed as a common carrier.

FINDINGS OF FACT

4. The Chief, Common Carrier Bureau designated this case for hearing on October 19, 1990. *See* 55 F.R. 46866 *supra*. He designated two issues against Assignee, Pass Word, Inc.:

> (1) To determine in light of the findings in *Pass Word, Inc.*, 76 FCC 2d 465 (1980), *recon. denied*, 86 FCC 2d 437 (1981), *affirmed sub. nom. Pass Word, Inc.* v *FCC* 673 F. 2d 1363 (D.C. Cir. 1982), and the record to be adduced with respect to the conduct of Pass Word, Inc. and Mr. Rodney J. Bacon since the revocation of their PLMS licenses, whether Pass Word, Inc. and its principals possess the requisite qualifications to be a radio common carrier licensee of this Commission.
>
> (2) To determine in light of the matters presented with respect to the foregoing issues, whether grant of the above captioned assignment would serve the public interest, convenience and necessity.

5. The Commission says that the following four questions must be considered in determining whether an applicant (former licensee) has been rehabilitated:

> (1) Has the applicant been involved in any wrongdoing since the past misconduct occurred?
>
> (2) How much time has elapsed since that misconduct?
>
> (3) What is the applicant's reputation for good character in the community? and
>
> (4) Has the applicant taken meaningful measures to prevent the future occurrence of misconduct?

In addition the Commission says that where previous Commission consideration of the misconduct resulted in denial of an application, the deterrent impact of the Commission's previous action may provide a basis for concluding that a recurrence of misconduct is unlikely.

6. On March 12, 1980, the Commission revoked the DPLMRS licenses of Pass Word, Inc. and Rodney J. Bacon d/b/a Coeur d' Alene, Answering Service. Bacon was president and principal owner of Pass Word and the sole owner of Coeur d' Alene. In those capacities he deliberately constructed and began operating several DPLMRS channels long after the construction permits for those frequencies expired. That late construction and the illegal operation was entirely the product of Bacon's independent business judgment.

7. Over a three year period (1974-1976), and in forms, correspondence and pleadings filed with the Commission, Bacon repeatedly and deliberatedly misrepresented and concealed facts about the construction and operation of those DPLMRS channels. He told these lies because he wanted: to obtain license to cover construction of those channels; to obtain permits for the construction of additional channels; and to forestall commission inquiry into the late construction and operation of those DPLMRS channels, and his (Bacon's) responsibility therefore. So the Commission concluded "[t]he only appropriate remedy for such flagrant, unmitigated disregard for licensee responsibility is revocation."

8. In order to survive after losing all of its DPLMRS authorizations, Pass Word developed two other radio communications businesses -- one line being unregulated, the other regulated by the FCC. Since the early 1980's Pass Word has served principally as an agent/reseller of RCC paging service and also as an agent for specialized mobile radio service licensees. Agents are assigned mobile radio telephone numbers in bulk by licensee/principals. Paging service is then provided to agents' customers over licensees' transmitting facilities at retail rates. Some agents and resellers, including Pass Word, also sell and maintain communications equipment. Generally, the agent retains service revenues and the proceeds of pager and mobile radio sales and rentals.

9. Thus Pass Word's unregulated agencies and resale arrangements have permitted Pass Word to stay in touch with the RCC industry and to continue in a non-licensee capacity the mobile communications business which has traditionally been an important adjunct to the telephone answering bureau.

10. Pass Word's regulated line of business is as licensee of stations providing private carrier communications services in the Spokane area of western Washington and in northern Idaho. They received their first license in 1984. Their private carrier mobile stations serve persons who are eligible for one-way paging and two-way mobile radio. Their private radio applications frankly disclosed the 1980 Revocation Order (*See* para. 6 *supra.*), and their partial assignment application alerts the Common Carrier Bureau to its private carrier licensee status. Pass Word's mobile radio operations are regulated under Part 90 of the Commission's Rules as opposed to Part 22 common carriers.

11. Rodney Bacon is not a Commission licensee. He and his wife own and continue to own a telephone answering service at Coeur d' Alene, Idaho. The Coeur d' Alene Answering Service, Inc. employs about 15 operators. Bacon is also a partner in a real estate partnership which owns commercial property in Spokane. He participates in trade association activities and presently serves as president (1990-1991) of the Northwest Telemessaging Association, the telemessaging industry's trade association for Washington and Oregon.

12. Pass Word and Rodney Bacon haven't been involved in any non-FCC related wrongdoing since the misconduct described in paras. 6-7 *supra.* This includes both adjudicated and unadjudicated non-communications misconduct such as violations of criminal statutes or serious civil misconduct involving moral turpitude.

13. Similarly, and during Pass Word's six-year tenure as a private radio licensee it has received no Commission notice of any possible violation of the Communications Act, or FCC rules, regulations, policies and orders. Thus, the Chief, Common Carrier Bureau's observation in the Hearing Designation Order is justified (55 F.R. 46866 *supra.* at para. 6):

> " . . . it does not appear that Pass Word or its President, Mr. Bacon has been involved in any wrongdoing since the . . . misconduct which was the subject of the referenced proceeding."

The Commission's first question (para. 5(1) *supra.*) is answered in Pass Word's and Rodney Bacon's favor.

14. The Commission's second question about the passage of time (para. 5(2) *supra.*) must also be answered in Rodney Bacon's favor. The misconduct that caused the Commission to revoke Pass Word's DPLMRS' licenses in the first instance occurred between 1974 and April, 1976 - well over *fourteen* years ago. This falls well within the Commission's holding that even in instances where there has been a "a flagrant disregard of the Commission's regulations and policies," a ten year limitation should apply. As the Commission states "[t]he 'inherent equity and practical difficulty' involved in requiring applicants to respond to allegations of greater age suggests that such limit be imposed." *See Character Qualifications*, 102 F. 2d 1179 (1986) at 1229.

15. Pass Word has also demonstrated that the Commission's third question should be resolved in their favor. As Pass Word's principal, Mr. Bacon enjoys a good reputation in Spokane, where he has resided most of his life and where he earns a livelihood. They have submitted an array of declarations from representative Spokane community leaders. Each such leader knows Mr. Bacon and willingly attests to his good local reputation for moral and law-abiding character.

16. The imposing group of community leaders include: (1) Rev. Joel Crosby, the senior Pastor of Knox Presbyterian Church, a member of the Spokane City Council, and the owner of Crosby creations - a small computer accessories manufacturer; (2) James E. West, a deputy sheriff (1975-1978), a city councilman (1980-1983) and presently a member of the State Legislature; (3) Timothy G. Reitemeier, President and General Manager of the Spokane Area Chamber of Commerce; (4) Dale Stedman, the President/CEO of the Inland Automobile Association, the regional Triple-A affiliate; and (5) Paul R. Nolan, a member of several law enforcement and public safety professional organizations.

17. Next, it is found that Pass Word has taken reasonable measures to prevent the recurrence of misconduct which resulted in revocation (paragraph 5(4) *supra.*). Bacon admits that his immaturity was at least in part responsible for his inability to function in a regulatory environment in the mid-70s. The passage of time has cured this deficit and allowed Mr. Bacon to gain business experience and appreciate operating in a regulatory environment. Pass Word's record of performance as a private radio licensee amply demonstrates that he has functioned well at Pass Word's helm in that regulatory environment.

18. Mr. Bacon now is able to concentrate on policy and planning, and to delegate day-to-day matters to his staff. He admits that such delegations were not possible in the 1970s. In those days he assumed responsibility for but did not efficiently discharge a myriad of activities.

19. Bacon no longer assumes responsibility for such time consuming tasks as constructing radio stations. Now he delegates that to function Pass Word technicians. He is no longer compulsively preoccupied with handling day-to-day minutes. He now seeks legal advice before the fact, not after the fact.

20. Finally, having had DPLMRS licenses revoked, Bacon now appreciates that FCC licensure is a privilege, and realizes that the Commission must be able to rely on the honesty and integrity of their licensees if the system is to work.

CONCLUSIONS OF LAW

21. Pass Word has proven that it can relate responsibly to the Commission, with other licensees, and with the public it serves. Neither Pass Word nor Rodney Bacon has been involved in any misconduct since the past misconduct occurred. The misconduct involved occurred over fourteen years ago. Rodney Bacon possesses a reputation for good character in the community, and has taken measures to prevent any future occurrence of misconduct. So it is concluded that Rodney Bacon is rehabilitated, and Pass Word is given the chance to return to the common carrer community.

SO the Motion For Summary Decision that Pass Word, Inc. filed on January 17, 1991, IS GRANTED;

Issues 1 and 2 at 55 F.R. 46866 published November 7, 1990 ARE RESOLVED in Pass Word's favor; and

Unless an appeal is taken from this Summary Decision or the Commission reviews it on its own motion, File No. 23678-CD-P/L-01-86 for consent to partially assign the license of Public Land Mobile Service Station KPD783, on 35.50 MHz at Sandpoint, Idaho, IS GRANTED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] Another party to the proceeding, Courtesy Communications, Inc. (Courtesy) was primarily responsible for getting this case designated for hearing. *See* 55 F.R. 46866 *supra*. at paras. 1, 3, 4, 6, and 11. However, on November 16, 1980, Courtesy's counsel pulled out of the proceeding, and three days later Courtesy Communications itself withdrew from the hearing. *See* FCC 90M-371 released November 28, 1990.

[2] If exceptions aren't filed within 30 days, or the Commission doesn't review it on its own motion, this Summary Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal Nos. 2735 and 2866

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: February 15, 1991; Released: February 15, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2735 and 2866 to modify Virtual Telecommunications Network Service (VTNS) Option 4 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations.

2. The Transmittal 2735 revisions to Option 4 add the following capabilities and features: the ability to add voice transmission capabilities (VTCs); the ability to add data transmission capabilities (DTCs) at various additional speeds; the ability to add Type 1 and Type 2 access components; the availability of a VTNS Partitioned Data Base Management feature; and the ability to place calls with the use of a Promotional Port Access Telephone Number. The tariff revisions also increase the basic charge from $594,500 to $5,151,174 per month and modify the service elements included in the basic charge; decrease measured charges; increase the minimum annual charge from $33,701,200 to $77,000,000 for the first year of the multi-year service period, to $60,000,000 for the second year, to $43,000,000 for the third year, and to $60,000,000 for each additional optional year; modify the domestic usage volume pricing plan; modify the international usage volume plan; modify the domestic DTC volume pricing plan; introduce a domestic 9.6 kbps and 56 kbps DTC access component pricing plan; and modify the changes and installation charges provisions. AT&T Transmittal No. 2735 Description and Justification (D&J) at 2-16. An Option 4 customer has a three-year term and an option of continuing service at the same rates for two additional one-year periods. Transmittal No. 2866 further revises Option 4 by clarifying Section 7.6.2.H. *See* AT&T Transmittal No. 2866, AT&T Tariff F.C.C. No. 12, Section 7.6.2.H.

3. Williams Telecommunications Group, Inc. (Williams) filed a petition against the Option 4 modifications on December 6, 1990. AT&T filed a reply on December 17, 1990.

4. Williams argues that Tariff 12 options are not generally available and that AT&T's cost support is inadequate. Williams Petition at 16-19, 22-23. Williams also claims that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. *Id.* at 19. Williams further contends that the Commission should adopt, or require AT&T to adopt, safeguards to remedy any unlawful discrimination that will occur if the revisions to Option 4 take effect. *Id.* at 24-25.

5. AT&T replies that the *Tariff 12 Remand* [1] did not call into question the lawfulness of Tariff 12, but rather remanded on the "technical ground" that the Commission had not "turn[ed] square corners of administrative law" in terminating the investigation of the initial options. AT&T Reply at 3-6. AT&T also asserts that Tariff 12 options are generally available and claims that a number of options have multiple, unaffiliated customers. AT&T further contends that its cost support is adequate. *Id.* at 7-8.

6. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2735 and 2866, the petition filed by Williams, and related pleadings. We conclude that no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection.

7. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although these transmittals do not present new questions that warrant investigation at this time, they are related to the pending remand proceeding in CC Docket No. 87-568 because Option 4 has been expressly made a part of that proceeding. *See* AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, Order, FCC 91-29, released Feb. 1, 1991, at para. 1 n.1. Accordingly, Transmittal Nos. 2735 and 2866 take effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

8. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2735 filed by Williams Telecommunications Group, Inc., IS DENIED.

9. IT IS FURTHER ORDERED that Transmittal Nos. 2735 and 2866 take effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990) (*Tariff 12 Remand*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal Nos. 2756 and 2862

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: February 19, 1991; Released: February 22, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2756 and 2862 to introduce Virtual Telecommunications Network Service (VTNS) Option 80 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations.

2. US Sprint Communications Company Limited Partnership (Sprint), MCI Telecommunications Corp. (MCI), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Option 80 on December 17, 1990. AT&T filed a reply on December 21, 1990.

3. Sprint contends that Option 80 raises the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand* [1] and must be reviewed in light of the remand. Sprint Petition at 1-2; *see also* MCI Petition at 2-3; Williams Petition at 2; CompTel Petition at 3. Sprint argues that AT&T has failed to demonstrate that Option 80 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between Option 80 and AT&T's other services. Sprint Petition at 6-8; *see also* MCI Petition at 3-5; Williams Petition at 2-12; CompTel Petition at 4. Sprint further contends that even if Option 80 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and thus are discriminatory. Sprint Petition at 8-9. Sprint also argues that Option 80 impermissibly bundles 800 Service with SDN Service for the application of the Domestic Usage Volume Pricing Plan in violation of Section 201(b) of the Communications Act. Sprint Petition at 10-11; *see also* MCI Petition at 4-5; Williams Petition at 18-19; CompTel Petition at 6-7 (also alleging that AT&T is unlawfully leveraging its market power in international services). MCI charges that AT&T has not provided adequate cost support as required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, to justify the price differences between Option 80 and its component services available under standard AT&T tariffs. MCI also contends that the Commission must review the underlying contracts to reliably determine whether price differences between Option 80 and other Tariff 12 options are justified. MCI Petition at 5 & 5 n.6. Williams argues that Tariff 12 options are not generally available and that AT&T's cost support is inadequate. Williams Petition at 12-16; *see also* CompTel Petition at 4 n.2, 9-11. Williams also claims that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. Williams Petition at 16. Williams further contends that the Commission should adopt, or require AT&T to adopt, safeguards to remedy any unlawful discrimination that will occur if Option 80 takes effect. *Id.* at 21-23. Williams also alleges that if Tariff 12 is found to be a system of unlawful preferences, Tariff 12 customers could be liable to the Federal Government for treble the value of the preference under Section 503(a) of the Communications Act, 47 U.S.C. § 503(a). *Id.* at 23-24.

4. AT&T replies that the *Tariff 12 Remand* did not call into question the lawfulness of Tariff 12. AT&T Reply at 4-7. AT&T denies that Option 80 unlawfully leverages AT&T's alleged advantage in international services into other markets. *Id.* at 9 n.*. Further, AT&T contends that there is no unreasonable discrimination between the rates in Option 80 and rates in other VTNS options. *Id.* at 12-14. AT&T asserts that Tariff 12 options are generally available and claims that a number of options have multiple, unaffiliated customers. *Id.* at 12 n.**.

5. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2756 and 2862, the petitions filed by Sprint, MCI, Williams, and CompTel, and related pleadings. We conclude that no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection.

6. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal Nos. 2756 and 2862 take effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

7. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2756 filed by US Sprint Communications Company Limited Partnership, MCI Telecommunications Corp., Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE DENIED.

8. IT IS FURTHER ORDERED that Transmittal Nos. 2756 and 2862 take effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See MCI Telecommunications Corp.* v. FCC, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990) (*Tariff 12 Remand*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-32

In the Matter of

Amendment of Section 73.202(b), RM-7606
Table of Allotments,
FM Broadcast Stations.
(Chetek, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 11, 1991; Released: February 26, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Chetek Broadcasters ("petitioner") seeking the allotment of FM Channel 294C2 to Chetek, Wisconsin, as that community's first local broadcast service. Petitioner provided an engineering study in support of the petition and indicated it would apply for the channel, if allotted.

2. We believe the proposal warrants consideration because the proposed allotment could provide a first local broadcast service to Chetek. Channel 294C2 can be allotted to Chetek, Wisconsin, in compliance with the minimum distance separation requirements of the Commission's Rules, provided there is a site restriction 2 kilometers (1.2 miles) east of the community.[1] The site restriction will prevent a conflict with Channel 296C2, New Richmond, Wisconsin. Since Chetek, Wisconsin, is located within 320 kilometers (200 miles) of the U.S. - Canadian border, Canadian concurrence will be requested for this allotment.

3. In view of the above, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

	Channel No.	
City	Present	Proposed
Chetek, Wisconsin	----	294C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 19, 1991,** and reply comments on or before **May 6, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard J. Hayes, Jr.
1359 Black Meadow Road
Spotsylvania, Virginia 22553
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's R ies. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 294C2 at Chetek are 45-19-23 and 91-37-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-463

In the Matter of

Amendment of Section 73.202(b), RM-7371
Table of Allotments,
FM Broadcast Stations.
(Coleraine, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 11, 1991; Released: February 26, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6251 (1990), issued in response to a petition filed by Lew Latto ("petitioner"). The *Notice* proposed the allotment of FM Channel 241C1 to Coleraine, Minnesota, as that community's first FM broadcast service. Petitioner filed comments in support of the *Notice* and stated his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 241C1 to Coleraine, Minnesota, since it could provide the community with its first FM broadcast service. Channel 241C1 can be allotted to Coleraine, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules, provided there is a site restriction 8.6 kilometers (5.4 miles) north of the community.[1] The site restriction will prevent a short spacing to Station KKSR, Channel 241A, Sartell, Minnesota.[2] Since Coleraine is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 12, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Coleraine, Minnesota	241C1

4. The window period for filing applications for Channel 241C1 at Coleraine will open on **April 15, 1991,** and close on **May 15, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 241C1 are 47-21-24 and 93-25-47.

[2] The license for Station KKSR, Sartell, has been modified to specify operation on Channel 244C2 in lieu of Channel 241A (BPH-890627IE). Once Station KKSR is licensed on Channel 244C2, city reference coordinates could be used for Channel 241C1 at Coleraine.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-528

In the Matter of

Amendment of Section 73.202(b), RM-7498
Table of Allotments,
FM Broadcast Stations.
(McLain, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 11, 1991; Released: February 26, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6594 (1990), issued in response to a petition filed by Community Broadcasting, Inc. ("petitioner"). The *Notice* proposed the allotment of Channel 245A to McLain, Mississippi, as that community's first local service. Petitioner filed comments in support of the allotment of Channel 245A at McLain and stated its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 245A to McLain, Mississippi, since it would provide the community with its first local service. Channel 245A can be allotted to McLain in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 11.7 kilometers (7.3 miles) southeast of the community.[1] The site restriction will prevent a conflict with vacant but applied for Channel 243A, Richton, Mississippi.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 12, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
McLain, Mississippi	245A

4. The window period for filing applications will open on **April 15, 1991,** and close on **May 15, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 245A are 31-03-54 and 88-43-01.

[2] Petitioner has requested that the coordinates for vacant Channel 243A at Richton be changed to reflect those specified by the applicant (BPH-891031MG) for Channel 243A, thereby reducing the site restriction imposed on Channel 245A at McLain. We cannot change allotment coordinates to conform with coordinates specified in an application. However, we note that if a license is granted at the applicant's site, no site restriction would be required for the McLain allotment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-565

In the Matter of

Amendment of Section 73.202(b), RM-7536
Table of Allotments,
FM Broadcast Stations.
(Deer River, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 11, 1991; Released: February 26, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 7033 (1990), proposing the substitution of FM Channel 288C1 for Channel 288A at Deer River, Minnesota, and modification of the construction permit for Station KXGP to specify the new channel. The *Notice* was issued in response to a petition filed by Radio Ingstad Minnesota, Inc. ("petitioner"). Petitioner filed comments reaffirming its interest in the channel. No other comments were received.

2. We believe the public interest would be served by substituting Channel 288C1 for Channel 288A at Deer River, Minnesota, because this would provide the community with a wide area FM broadcast service. As indicated in the *Notice*, Channel 288C1 can be allotted to Deer River, Minnesota, consistent with the Commission's spacing requirements at petitioner's specified site 30.1 kilometers (18.7 miles) east of the community.[1] Since Deer River is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government has been obtained for this allotment. We will authorize a modification of petitioner's construction permit for Station KXGP, Deer River, to specify operation on Channel 288C1 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 12, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Deer River, Minnesota	288C1

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KXGP, Deer River, Minnesota, IS MODIFIED to specify operation on Channel 288C1, in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 288C1 are 47-23-00 and 93-24-10.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-567

In the Matter of

Amendment of Section 73.202(b), RM-7468
Table of Allotments,
FM Broadcast Stations.
(Marquette, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 11, 1991; Released: February 26, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6993 (1990) issued in response to a petition filed by Iron Mountain-Kingsford Broadcasting Company ("petitioner"). The *Notice* proposed the allotment of Channel 231A to Marquette, Michigan, as that community's third FM broadcast service. Petitioner filed comments in support of the *Notice* and stated its intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 231A to Marquette, Michigan, since it could provide the community with its third FM broadcast service. Channel 231A can be allotted to Marquette in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules without a site restriction.[1] Since Marquette is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government has been obtained.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 12, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Marquette, Michigan	231A, 239C1, 277C1

4. The window period for filing applications for Channel 231A at Marquette will open on **April 15, 1991,** and close on **May 15, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 231A are 46-33-00 and 87-23-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-538

In the Matter of

Amendment of Section 73.202(b), RM-7508
Table of Allotments,
FM Broadcast Stations.
(Tomah, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 11, 1991; Released: February 26, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6759 (1990), issued in response to a petition filed by Jamie Lee Westpfahl ("petitioner"), proposing the substitution of FM Channel 233C3 for 233A at Tomah, Wisconsin. Petitioner also requested modification of her construction permit for Station WZFR, Channel 233A, to specify operation on Channel 233C3. Petitioner filed supporting comments in which she reaffirmed her interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 233C3 for Channel 233A at Tomah, Wisconsin, since it could provide an additional wide coverage area FM service for the community. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site 15 kilometers (9.3 miles) east of the community.[1] This site will avoid short spacings to the construction permit (BPH-900129IC) for Station WPRE(FM), Channel 232C2, Prairie du Chien, Wisconsin, and the construction permit (BPH-881206MB) and modification application (BMPH-900627IG) for Station KKOO(FM), Channel 234A, Caledonia, Minnesota. In addition, we will modify the construction permit for Station WZFR, Tomah, to specify operation on Channel 233C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 12, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Tomah, Wisconsin	233C3, 241A, 255C

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WZFR, Tomah, Wisconsin, IS MODIFIED to specify operation on Channel 233C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 233C3 are 43-57-19 and 90-19-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-358

In re Applications of

TEXAS COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870710MI
BEAUMONT SKYWAVE, INC.	File No. BPH-870710NA
CHM BROADCASTING	File No. BPH-870710NC

For Construction Permit for New FM Station, Channel 273C2, Beaumont, Texas

MEMORANDUM OPINION AND ORDER

Adopted: February 13, 1991; Released: February 27, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On November 16 and 19, 1990, CHM Broadcasting (CHM) and Texas Communications Limited Partnership (Texas Ltd.), respectively, filed petitions for reconsideration of the Board's *Decision*, 5 FCC Rcd 5876 (Rev. Bd. 1990), in the captioned proceeding, which disqualified both applicants and granted the surviving application of Beaumont Skywave, Inc., (Beaumont), subject to a condition suggested by the Mass Media Bureau, *see* 5 FCC Rcd at 5877, 5879. We deny reconsideration for the reasons set out below.

CHM BROADCASTING

2. In disqualifying CHM under a financial qualifications issue, the Board found that CHM had not met its burden of proof of demonstrating that its limited partner Kent Foster, upon whom it was relying for a personal loan to fund its estimated $482,000 construction and initial three months operating expenses, had sufficient readily convertible financial resources to satisfy his commitment here as well as simultaneous commitments (totalling over $4 million) to fund numerous other broadcast applications pending before the Commission.

3. Specifically, in arriving at our determination, we relied on CHM's Financial Exhibits 4-8, which consisted of Foster's "reconstructed" personal financial statement, dated March 1989 (CHM Fin Exh.4, at Exh. D), his list of investments in FM applications (CHM Fin. Exh. 4, at Exh. E), as well as professional appraisals for certain of Foster's 1989 illiquid assets (CHM Fin. Exhs. 5, 6, 7, and 8). CHM now contends in its petition for reconsideration that the Board erroneously included in its calculations of Foster's broadcast obligations, two applications (totalling commitments for $1 million), which had been dismissed as of the date of Foster's financial statement. It further argues that the Board understated Foster's available assets by excluding his interests in a cellular system, property held in the Cayman Islands, notes receivable, and a prospective bank loan commitment purportedly obtained by the date our *Decision* had been adopted. With respect to the prospective bank loan commitment, CHM accompanies its petition for reconsideration with a petition to amend its application to include two new bank loan commitment letters, each totalling $500,000.

4. We will deny CHM's petition for reconsideration and its petition for leave to amend. Although CHM is correct that two of the broadcast application obligations on its own tendered list of Foster's investments in FM applications (for Abilene, Texas and Ocean Pines, Maryland) had been dismissed by the date of Foster's financial statement, and therefore should be eliminated from his financial obligations, our reexamination of that exhibit also reveals that CHM's own recitation of Foster's cumulative aggregrate obligations omitted a $500,000 obligation (for Longview, Texas) which was not counted previously. Additionally, Foster's March 1989 liabilities, noted in our *Decision* as $630,000, was understated, and should be set at $840,000. *See* CHM Fin. Exh. 4, at Exh. D. Thus, although the total obligations will be modified somewhat, they now show liabilities of $840,000, and obligations to various FCC applications for approximately $3.6 million, or a total of $4,440,000 which Foster had to show he could raise. His total assets, however, are $4,082,000, including liquid assets of approximately $1.5 million. Accordingly, our modification is not decisional. And, as for CHM's contentions that additional illiquid assets should be included in the amount available for funding, these contentions are simply a rehash of arguments previously raised by CHM. The Board will not reconsider matters on which it has previously deliberated. *WWIZ, Inc.*, 37 FCC 685 (1964).

5. Lastly, there is no legal basis for including the new bank letters into the financial calculus to find CHM financially qualified. As noted in our *Decision*, 5 FCC Rcd at 5877, CHM originally had an alternative financing plan whereby it was relying on loans from the East Texas State Bank and Foster in the amounts of $350,000 and $150,000, respectively. The amount of the original bank commitment letter, however, standing alone, was insufficient to find that applicant financially qualified, since CHM's estimated costs were $482,000. *See I.D.*, para. 50. In light of the obvious initial deficiency, CHM cannot at this stage of the proceeding augment its financial proposal in a second attempt to prove its financial qualifications. *See e.g. Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751 (1990)(if applicant lacked reasonable assurance of financial qualifications at the time of certification, it cannot rely on a later bank letter to support the earlier certification). The burden of proving its financial qualifications in a timely and orderly fashion at hearing was on CHM. *See e.g., Commercial Radio Institute, Inc.*, 78 FCC 2d 1016, 1030 (Rev. Bd. 1980). As we reminded an applicant in that case, "We cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government

could operate efficiently or accurately if such a procedure were allowed." *Id.*, at 1030-1031, quoting *Colorado Radio Corp. v. FCC*, 118 F. 2d 24, 26 (1941).

TEXAS LTD.

6. In denying Texas Ltd.'s application, we affirmed the ALJ's finding that Texas Ltd.'s own dilatory conduct, both before and after its application was designated for hearing in August of 1988, required denial of its belated attempt to resolve its air hazard problem, 5 FCC Rcd at 5876-77. Texas Ltd.'s argument (pet. pp. 3-4) that the Board incorrectly concluded that the FAA had determined that its original site constituted a hazard to air navigation will not be entertained because it is a mere rehash of arguments which were previously considered by both the ALJ at the hearing and the Board on appeal. *See* para. 4, above; *see also* Beaumont's response in opposition, pp. 4-5, Attachment A. (FAA Letter dated November 9, 1988).

7. Texas Ltd. also urges (pet. at pp. 1-3) that: "In light of the change of the policy of the Mass Media Bureau with respect to Electromagnetic Interference ("EMI"), the Board should rescind its conditional grant of the application of Beaumont . . . and remand this proceeding for consideration of the possible EMI affects of all three applicants." After recent negotiations with the FAA, the Bureau has adopted a policy of supporting grant of applications with EMI problems only when FAA approval has been obtained. We agree with the Bureau's opposition, pp. 2-3, that this new policy should not be applied retroactively in this case where the Bureau itself had earlier developed a conditional grant that would serve the public interest. *See* para. 1 above. Thus, neither argument requires us to set aside our original *Decision*.

8. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed December 17, 1990 by CHM Broadcasting IS DENIED; and,

9. IT IS FURTHER ORDERED, That the petition for reconsideration filed November 16, 1990 by CHM Broadcasting is granted to the extent indicated herein and in all other respects IS DENIED; and that the petition for reconsideration filed November 19, 1990, by Texas Communications Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-352

In re Applications of

Eunice Wilder and Sheridan Broadcasting Corp. d/b/a WEYBURN BROADCASTING LIMITED PARTNERSHIP	File No. BPH-851213MN
WKIE-FM, INC.	File No. BPH-851216OA
BARBARA B. BENNS	File No. BPH-851216ON
JAMES RIVER COMMUNICATIONS CORPORATION	File No. BPH-851216OO
FUTURE BROADCAST LIMITED PARTNERSHIP	File No. BPH-851216OV
WITJO BROADCASTING, INC.	File No. BPH-851216OX
PENNY DRUCKER	File No. BPH-851216QB
VIRGINIA COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-851216QE

For Construction Permit for
New FM Station, Channel 266A,
Richmond, Virginia

Appearances

Morton L. Berfield, Roy W. Boyce, and *John J. Schauble*, on behalf of Weyburn Broadcasting Limited Partnership; *William E. Kennard, Michael E. Beller*, and *David A. Naimon*, on behalf of WKIE-FM, Inc.; *Lauren A. Colby*, on behalf of Barbara B. Benns; *Richard J. Bodorff* and *Jonathan W. Emord*, on behalf of James River Communications Corporation; *Robyn G. Nietert, Robert J. Rini*, and *Eric S. Kravetz*, on behalf of Future Broadcast Limited Partnership; *Israel Teitelbaum*, on behalf of Witjo Broadcasting, Inc.; *David M. Silverman* and *Robert G. Scott, Jr.*, on behalf of Penny Drucker; *Gregg P. Skall* and *Kenneth C. Howard, Jr.*, on behalf of Virginia Communications Limited Partnership.

DECISION

Adopted: February 13, 1991; Released: February 27, 1991

By the Review Board: MARINO (Chairman), and ESBENSEN. Board Member BLUMENTHAL not participating.

Board Chairman MARINO:

1. This eight-party comparative case returns to the Review Board following a *Supplementary Summary Decision*, 5 FCC Rcd 3812 (ALJ 1990) (*SSD*), by Administrative Law Judge Joseph Chachkin (ALJ), summarily resolving in favor of James River Communications Corporation (James River) financial and related reporting issues on which the case had been remanded. 5 FCC Rcd 861 (Rev. Bd. 1990) (*Remand Order*). In his earlier *Initial Decision*, 4 FCC Rcd 5310, 5340 (ALJ 1989) (I.D.), James River had been found to be the comparative "winner" because its 100% quantitative credit for participation of ownership in the management of the proposed station was enhanced by its 100% principal "McDaniel's lifelong residence, extensive involvement in Richmond civic activities, 100% minority and female ownership, and broadcast experience . . . ."

2. Exceptions were filed to the I.D. by seven competing applicants whose applications were denied, Weyburn Broadcasting Limited Partnership (Weyburn), WKIE-FM, Inc. (WKIE), Barbara B. Benns (Benns), Future Broadcast Limited Partnership (Future), Witjo Broadcasting, Inc. (Witjo), Penny Drucker (Drucker), and Virginia Communications Limited Partnership (Virginia Communications). Two other applicants did not file exceptions and their applications were dismissed in our *Remand Order*, *supra*. The supplemental exceptions filed by the parties now argue that the ALJ erred in granting summary decision in favor of James River on the remanded issues, and some of the parties urge that on the record before the ALJ, the basic qualifications issues should have been resolved against James River. For the reasons set out below, we conclude that the ALJ's recent *SSD*, and original I.D., are supported by the record and controlling precedent, and affirm his grant of James River's application.

SUPPLEMENTARY SUMMARY DECISION

3. The Board's remand of this proceeding on financial and related issues against James River was based on a series of contemporaneous actions, which, when viewed collectively, raised substantial and material questions of fact concerning whether the bank loan commitment for $500,000, on which James River had certified its financial qualifications, had lost its efficacy before the applicant secured new financing on February 14, 1988. Assuming the original commitment had lapsed, a second question was presented whether James River properly reported to the Commission the loss of its funding, as required by Section 1.65 of the Commission's Rules, 47 CFR §1.65, and, if not, whether the applicant could meet the Commission's "good cause" test set forth in *Erwin O'Connor*

Broadcasting Co., 22 FCC 2d 140, 143 (Rev. Bd. 1970) for amending its application to reestablish its financial qualifications.

4. A letter from the Bank of Virginia, dated December 11, 1985, evidencing the original loan commitment (James River's application was filed December 16, 1985), explicitly stated that the funds would be available "assuming no adverse change in present conditions" of information previously supplied, and further stated that the loan was subject to the personal guarantees of the James River principals. Those principals were Claudette Black McDaniel, the sole voting shareholder and 20% equity owner, and Doctors Renard and Cynthia Charity, husband and wife, who, at that time, were non- voting shareholders with an aggregate 80% ownership of the applicant. The Charitys subsequently sold their non-voting shares to Robert Fish on January 15, 1988, and are no longer principals in the applicant. A $500,000 bank loan commitment was subsequently obtained from the Fleet National Bank of Providence, Rhode Island in February 1988, after Fish joined the applicant. That loan commitment was not questioned by our *Remand Order*.

5. The specific facts giving rise to the remanded issues were: (1) The collapse of a building under construction in which the Charitys were involved, killing one person and injuring another, shortly after the case had been set for hearing; (2) testimony by McDaniel that the Charitys had a "tremendous financial problem" when the building collapsed and were no longer enthusiastic about continuing as investors in the venture; (3) non-payment of prosecution expenses beginning shortly after the building collapse, resulting in the withdrawal of initial FCC counsel, which, combined with the factors above, engendered allegations that the Charitys had, in fact, withdrawn from the application, thereby removing the predicate underlying the bank loan commitment; and (4) two lawsuits filed against McDaniel, which could also impact on the validity of the bank commitment, as well as raised questions as to whether she could or would meet her *pro rata* share of the applicants expenses.

6. Following the remand, James River filed (on May 4, 1990) a voluminous motion for summary decision, attaching thereto: (1) the declarations of the Charitys and John Vogel, Executive Vice President of the Signet Bank of Virginia (previously the Bank of Virginia) and the signatory of the Bank of Virginia letter; and (2) the transcripts of the depositions taken of the Charitys; William D. Bayliss, James River's local counsel; Vogel; McDaniel, and Fish. Based on this massive documentation submitted by the parties, the ALJ concluded that there was no genuine issue of material fact left to be determined at a hearing. That is, he found: "James River's financial qualifications have never been impaired"; "it has not violated the Commission's reporting requirements"; and its opponents, with the "benefit of deposing all witnesses with pertinent evidence" have not been able "to uncover even a shred of doubt as to James River's financial qualifications." *SSD*, at para. 12.

7. Initially, the exceptors contend that it was improper for the ALJ to resolve the issues in favor of James River without a hearing. Specifically, Benns argues that there are conflicts in testimony among the principals that can only be resolved by taking their testimony at hearing and observing the witnesses' demeanor. Witjo and WKIE concur that a hearing is necessary, adverting to the strong interest those witnesses have in the outcome of the proceeding, and noting that the witnesses refused to answer certain questions on advice of counsel.

8. We reject this contention. "The function of [a] summary decision rule, in its broadcast application, is to avoid a useless hearing." *Summary Decision Procedures*, 34 FCC 2d 485, 488 (1972)(bracket in original). Section 1.251 of the Commission's Rules, 47 CFR §1.251, vests authority on a presiding ALJ to grant a motion for summary decision where there is no genuine issue as to any material fact. In granting such a motion, the ALJ is required to scrutinize the documents of the moving party while treating the documents of the opposing parties with considerable indulgence. *Summary Decision Procedures*, 34 FCC 2d at 488; *Big Country Radio, Inc.*, 50 FCC 2d 967, 968 (Rev. Bd. 1975). Here, the fact that certain of the witnesses may have had a pecuniary stake in the outcome of the proceeding (*e. g.* the Charitys will receive approximately $30,000 if James River is the preferred applicant) is not a legal basis for mandating a hearing. Wide discovery on the issues was permitted by the ALJ, and the parties had ample opportunity to cross-examine the witnesses at deposition, even contacting the ALJ during the course of taking of depositions to obtain his rulings on contested areas of inquiry. James River Motion for Summary Decision, McDaniel Dep. pp. 49-58, 114-121. Like the ALJ, our examination of the depositions shows no persuasive basis for requiring his personal observation of the witnesses' demeanor.

9. Similarly, we perceive no need for a hearing based on purported conflicts in testimony. These so-called conflicts consist of minor clarifications of testimony or differences in recall of events occurring a number of years in the past, and are not pertinent to the issues at hand. One example will help illustrate the nature of these conflicts. Benns charges that the Charitys gave inconsistent testimony regarding their ownership interest in the medical building that collapsed (Supplemental Exceptions at 7-8). Thus, in a motion for leave to file petition for reconsideration, filed May 12, 1990 with the Review Board, James River stated (at p. 3) that "the Drs. Charity held a small *limited partnership* interest in the building . . . " (emphasis in original), whereas the *SSD* (at para. 4) cites her testimony that Dr. Cynthia Charity was a "general partner" in the partnership constructing the building. A review of Cynthia Charity's deposition, p.p. 15, 19, indicates, however, that the error occurred because she did not possess an understanding of the legal concept of a limited partner and did not have a copy of the actual legal document when answering her attorney's questions. Such conflicts are, in this instance, minor in nature and not sufficient grounds for reversing the ALJ's finding that a full trial-type hearing was not required.

10. The exceptors further contend that summary decision in favor of James River was erroneous, arguing first that the testimony adduced on the specific facts raised by the Board warrants James River's disqualification, and second, that the testimony revealed additional deficiencies by the principals that support disqualification.

11. Turning first to the specific concerns raised by the Board, we note with respect to the building collapse, that the ALJ concluded the collapse had no material adverse impact upon the Charitys' ability to meet their financial commitment to the applicant. He stated:

> The medical building undergoing construction was owned by a General Partnership called the West End Medical Group. Only Dr. Cynthia Charity had an ownership interest. She was a general partner with a 16% equity interest. Her husband, Dr. Renard Charity, was one of several guarantors on the Partnership loan from Sovran Bank. The Partnership had a general liability insurance policy wich was available to cover any indebtedness caused by the accident. The Partnership's liability was limited to repayment of draws made on the proceeds from state industrial development revenue bonds held at the Sovran Bank. Dr. Cynthia Charity's capital contribution to the partnership of $8,240 represented the full extent of her capital loss. The accident was due to the fault of the General Contractor and no suits arising out of the facts and circumstances of the accident were ever filed against the Partnership.

SSD, at para. 4. We note further that, as of December 1987, the Charitys' financial statement reflected a net worth of more than $1.25 million. James River Motion for Summary Decision, Exh. J. The parties contend, however, that the *SSD's* analysis is not wholly responsive since it fails to address the impact the collapse had on the perceptions of the Charitys in continuing their involvement with the James River application. They argue that the Charitys refused to pay the hearing fee some five days after the building collapse, and advert to documents (principally correspondence) generated in the wake of the accident that were circulated among the various parties to the building venture.

12. These arguments are not persuasive. Both Renard and Cynthia Charity testified, under cross-examination, that they believed, shortly following the building collapse, their liability was limited and was of no significance to the James River broadcast application. Renard Charity Dep. pp. 93-100; Cynthia Charity Dep. pp. 103-104. Ms. Charity testified that she and her husband declined to pay the hearing fee only because they had previously paid a substantial portion of the costs and felt that McDaniel should pay the fee pursuant to her agreement to share in the expenses. C. Charity Dep. pp. 62, 102. Both, however, reiterated their intentions to honor their commitments to the James River applicant until their interests were purchased by Robert Fish in January 1988. James River Motion for Summary Decision, Exh. F (Declarations of the Drs. Charitys); R. Charity Dep. p. 5; C. Charity Dep. p. 104. McDaniel's earlier testimony that the Charitys had tremendous financial problems when the building collapsed, *see Remand Order*, was based on her assumption rather than by discussions with the Charitys, and was properly discounted by the ALJ in light of the factual record. *SSD*, n. 3. Our examination of the documents, which in most part apprise the pertinent parties of the state of developments subsequent to the collapse, fails to reveal a legal basis for disregarding the Charitys' testimony. In sum, the exceptors' contentions rest on surmise and speculation, neither of which meet the threshhold requirement for mandating a hearing. *See Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (1989), *aff'd by judgment sub nom. New Life Evangelistic Center, Inc. v. FCC*, No. 89-1256 (D.C. Cir. February 7, 1990).

13. The ALJ further concluded that the bank commitment was never in jeopardy because of the building collapse (*Id.* para. 5), quoting Vogel's declaration at length (Vogel is the Executive Vice President of the Signet Bank of Virginia (previously Bank of Virginia), *see* para. 6, *supra)*:

> The Drs. Charity were long term customers of the Bank of Virginia (from since at least 1980) and held an account with us. In addition, the Bank had on hand financial statements for the Drs. Charity indicating that their net worth as of September 15, 1985 was in excess of $2.3 million, more than four times the amount of the loan being sought. Financial statements and tax returns from the Drs. Charity have been submitted to the bank periodically since that time. These statements and tax returns confirm that the Drs. Charity have had more than enough net worth to support a $500,000 loan from September of 1985 to the present.
>
> Relying upon these documents, upon the willingness of Ms. McDaniel and the Drs. Charity to provide their personal guarantees to support any loan and to permit the Bank to establish a lien on station equipment and upon the representations made by Mr. Bayliss on behalf of James River Communications Corporation, the Bank issued the attached letter of December 11, 1985. That letter set out the terms and conditions under which the Bank of Virginia would be willing to make a $500,000 loan to James River Communications Corporations.
>
> It is the Bank's position that the letter of December 11, 1985 remained valid and in full force and effect from the date of its issuance until the date on which Robert Fish acquired the Charitys' stock in James River Communications Corporation.
>
> From December of 1985 until approximately January 15, 1988 when Robert Fish acquired the Charitys' stock, I knew of no adverse financial circumstance that would warrant a change in the bank's letter of December 11, 1985. None of the updated personal financial statements or tax returns submitted by the Charitys to the Bank indicated any such adverse change. Furthermore, I have reviewed my records and can verify that at the time of the medical building collapse, September of 1987 and shortly thereafter, the Drs. Charity did not suffer any material adverse financial loss which I was made aware of which would have warranted a change in the bank's letter of December 11, 1985.

Id., at para. 6. We note further that Vogel testified the bank was willing to grant the loan based on the financial condition of the Charitys and their annual income (Vogel Dep., p. 22) and that the language of the particular letter was used on those occasions where "they are highly confident that [they] would make the loans" (*id.*, at p. 51).

14. Again, however, the opposing parties fault the analysis as incomplete, arguing the bank was not apprised of the building collapse, the lawsuits against McDaniel, and other factors purportedly reflecting the *de facto* withdrawal of the Charitys from the broadcast application. These contentions, similarly, are without merit. The building collapse did not affect the Charitys' financial posture, nor was McDaniel's finances the basis for the loan commitment. Indeed, as James River notes in its Reply Exceptions (at 13), Vogel had in his possession the Charitys' personal financial statements and tax returns for

each year from 1985 through 1987, and knew that their net worth always had exceeded one million dollars. *See A. P. Walter, Jr.*, FCC 91R-13, adopted February 1, 1991, at paras. 13-18. It is of note that James River's competitors, despite being afforded an opportunity to cross-examine Vogel at deposition, and able to communicate the purported adverse factors to him, were unable to elicit any retraction that the commitment was always available. Finally, the allegation that the Charitys withdrew from the the applicant prior to the sale of their stock to Fish is speculative and directly contrary to their sworn testimony.

15. The ALJ also found that the withdrawal of initial FCC legal counsel for non-payment of prosecution expenses was of no material concern to James River's financial qualifications. The James River account was in arrears for only a two month period, and the Charitys, who were responsible for 80% of the applicant's expenses, were not aware that the law firm had, for any period, stopped representing the applicant for non-payment of legal fees. *Id.*, paras. 9, 11. They were at no time unwilling or unable to honor their financial commitments to the applicant, *Id.*, para. 9, and, the ALJ added, the Charitys "remained committed to pay all debts and would have done so even past January 15, 1988 were it not for the arrival of new non-voting stockholder, Robert Fish who assumed the debts due and brought the balance current on the account." *Id.*

16. It should also be noted that the Commission has long held that where an applicant has shown itself willing and able to pay prosecution expenses on an ongoing basis, such costs will not detract from the applicant's financial qualifications. *Muncie Broadcasting Corp.*, 54 RR 2d 42, 46-47 (1983); *Northampton Media Associates*, 3 FCC Rcd 5164, 5167 (Rev. Bd. 1988), *review denied*, 4 FCC Rcd 3853 (1989); *ZIA Tele-Communications, Inc.*, 50 FCC 2d 182, 187-189 (Rev. Bd. 1974); *Sandern of Iowa, Inc.*, 26 FCC 2d 136 (Rev. Bd. 1970). Here, the Charitys testified at deposition that they were committed, until their stock was acquired by Fish, to fund 80 percent of the applicant's prosecution expenses (R. Charity Dep. pp. 5, 31, 36, 52-53, 80-81, 83; C. Charity Dep. pp. 44, 60-61), and did, in fact, provide funds of at least $11,144 (R. Charity Dep. 78). McDaniel also recognized that she is obligated to provide 20 percent of the applicant's funding (McDaniel Dep. 159, 186-187), and has, in fact, paid at least $6000 in costs (McDaniel Dep. 146). Currently, Fish and McDaniel have an agreement under which McDaniel remains liable for 20 percent and Fish 80 percent. *SSD*, para. 10.

17. Facially, therefore, the prosecution expenses in this proceeding would not have any significant impact on the availability of the bank loan commitment. The exceptors infer, however, from the untimely payment of prosecution expenses, including the withdrawal of James River's initial FCC counsel for non-payment of fees, that the Charitys were no longer interested in pursuing the broadcast application and intentionally let the legal bills lapse, thus undercutting the validity of the bank loan. The argument, however, provides no legal basis for finding James River financially unqualified since it is predicated solely on conjecture. As the ALJ found, Dr. Cynthia Charity was not aware that the law firm had for any period of time stopped representing the applicant for non-payment of legal fees. *SSD*, para. 9. Because of their efforts to remain insulated from contacts with McDaniel concerning the prosecution of the application, they were limited in their knowledge of the proceeding to that which their local legal counsel to the corporation told them. *Id.* They testified that they remained committed to honor their financial obligations until Fish purchased their shares. *Id.* Finally, the ALJ found that the lawsuits against McDaniel failed to establish a lack of financial wherewithal on her part to pay her *pro rata* share of the James River costs. *Id.*, para. 7. He noted that the lawsuits were withdrawn after her loans giving rise to the lawsuits were satisfied, and that she had, prior to the sale of the Charity stock, paid more than her *pro rata* share. *Id.* He also found that all current legal debts of McDaniel were being timely paid, and that there was no basis to the argument that she was or is unable or unwilling to meet her prosecution expenses. *Id.*, para. 8. We perceive no error. In summary, on review of all the documentation submitted with James River's Motion for Summary Decision, the areas, which we initially believed raised substantial and material questions of fact, have been satisfactorily answered in favor of James River. Since we conclude that James River never lost its financial qualifications from the time it first filed its application, there was no Section 1.65 violation, and that issue, too, must be resolved in favor of James River. *See Global Information Technologies, Inc.*, 5 FCC Rcd 3385, 3387 (Rev. Bd. 1990) (Section 1.65 only triggered where applicant loses reasonable assurance after it has filed its application).

18. The only remaining question with respect to James River's motion for summary decision is whether other testimony elicited at deposition raises additional substantial and material questions of fact requiring a hearing. In this regard, Weyburn contends that a question was raised whether McDaniel made adequate efforts to ascertain construction and operation costs, and whether the original Bank of Virginia loan commitment could be relied upon since the bank was not provided with a business plan or costs estimates for the proposed station, and purportedly never received assurances that the personal guarantees of the principals would be given. These contentions are not well-founded. McDaniel testified that, with counsel's assistance, she reviewed a sample budget provided from FCC Manuals and prepared a plan of financing for the application. McDaniel Dep. pp. 13, 129-130, 188. A copy of that budget is attached to James River's Motion for Summary Decision at Exh. A. It shows estimated costs of $201,800. Certain pre-operational expenses (legal, etc.) are not included. To cover those estimated costs the applicant obtained the Bank of Virginia loan commitment for $500,000, which provided a sizeable cushion for potential unforeseen expenses. *Id.*, Exh. C. John Vogel, the bank official in charge of making the loan, testified that a business plan was superfluous since the loan commitment was based on the financial condition of the Drs. Charity and their annual income. Vogel Dep. 22. He further testified that he was assured by William Bayliss, counsel acting on behalf of the applicant, the bank would have a subordinated lien on station equipment and the personal guarantees of the Charitys and McDaniel. *Id.*, at 39.

19. Finally, exception was also taken to the ALJ's failure to grant a motion for summary decision filed by Benns, seeking James River's disqualification on the financial issue. Essentially, Benns argued that James River was financially unqualified because the applicant had no plan for prosecuting the application and the partners had not exchanged financial data. James River argues that legal expenses are not a necessary part of the financial

qualifications standard, (*i.e* construction and initial three months operation costs) unless they are drawn from the same source of funds which the applicant has earmarked for the costs of construction and initial operations. Without accepting James River's legal proposition, *see e.g., Coast TV*, 5 FCC Rcd 6720, 6722 (Rev. Bd. 1990), the Board has previously refused to disqualify an applicant even though the legal fees were omitted from the applicant's cost estimates and were paid from the same source of funding as construction and operation costs. *Northampton Media Associates, supra*, 3 FCC Rcd at 5167, *aff'd*, 4 FCC Rcd 5517 (1989). As the ALJ noted in denying the motion, the facts militate more solidly in favor of James River than the applicant in *Northampton. Memorandum Opinion and Order*, FCC 90M-1738, released June 20, 1980. *See also* paragraph 16, *supra*. Benns also contends that James River was financially unqualified because its principals did not timely pay for their stock. In this regard, Benns argued that the subscription letters required payment on the date they were executed. However, as James River noted in opposition, the purpose of the stock subscription was to evidence a commitment to pay for stock at some future date, not to require payment immediately. The parties all indicated that they were committed to pay for the application expenses. We affirm the ALJ's ruling denying Benn's motion for summary decision. James River thus remains basically qualified to be compared with the other competing applicants.

COMPARATIVE ISSUES

20. Based upon specific findings of fact, I.D., paras. 87-143, and intermediate conclusions of law, *id.*, paras. 261-264, the ALJ held that James River is the comparative "winner" with 100% quantitative "integration" credit because Claudette Black McDaniel, its sole voting shareholder, will participate full time as general manager of the proposed station. *Id.*, para. 274. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965) (full-time participation in management level station operations by owners considered a factor of substantial importance because it links day-to-day performance with legal responsibility).

21. Our review of the record establishes that even if the seven competing applicants are all awarded 100% quantitative "integration" credit for integrating their entire voting ownership into station operation, *see McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7272 (Rev. Bd. 1990)(Commission looks to voting control to ascertain quantitative integration credit), James River would still prevail: None of the other applicants can match its qualitative superiority on all of the enhancing attributes which have traditionally been considered in FCC comparative cases, namely, the participating owners' (a) local residence, (b) civic participation, (c) minority ownership, (d) female ownership, and (e) past broadcast experience. *See Miracle Strip Communications*, 4 FCC Rcd 5064, 5065 (1985)(subsequent history omitted); *McClennahan Broadcasting, Inc., supra*.

22. James River's proposal was found to be qualitatively superior because of (a) its substantial (100%) enhancement credit for McDaniel's continuous forty years residence within the community of license (Richmond, Virginia), I.D., at para. 264, (b) further enhanced "to a significant degree by her extensive membership and developed relationships with numerous Richmond-based charitable and beneficent organizations." *Id.*, at para. 274. Since McDaniel is black and female, her application received substantial enhancement for (c) 100% minority, and (d) 100% female ownership. *Id.*, para. 264. Finally, even on the remaining factor, "her broadcast experience is superior to that of any other applicant." *Id.*, at 274.

23. No exceptions have been filed to these findings of qualitative superiority. Several of the competing applicants (Weyburn Br. 24-25; WKIE-FM, Br. 14-20, Benns Br. 28, WITJO Br. 11-12, and Drucker Br. 4-5) have, however, taken exceptions to the award of 100% quantitative credit to James River for McDaniel's participation "in light of Robert Fish's financial dominance of the corporation's affairs." WKIE-FM, at 14. A similar argument was considered and rejected by the Commission in *Doylan Forney*, 5 FCC Rcd 5423, 5427 (1990), and the *Forney* decision supports the ALJ's award of 100% credit to James River.

24. There, the active principal had made no significant financial investment in the application and its competitiors had argued that control over the applicant would be exercised by "those who supply the financing." The Commission responded: "When *de jure* control is vested . . . by written agreement" in a principal, comparative credit will not be reduced unless the objecting parties produce evidence that the passive principals "have acted inconsistent with the agreement or the totality of the circumstances . . . otherwise undermine the credibility of the applicant." 5 FCC Rcd at 5427 para. 26.

25. Here, the totality of the record evidence, thoroughly chronicled by the ALJ's findings of fact, I.D. paras. 92-131, establishes that, as in *Forney*, McDaniel was the moving force behind the James River application. She "first heard of the opportunity to file for a new FM station in Richmond through contacts in the radio industry"; she located the passive investors and obtained their financial commitment; and she retained local, communications, and engineering counsel. After talking to a realtor, she instructed local counsel to negotiate a transmitter site agreement and to draft articles of incorporation providing for voting and non-voting stock. She further selected a name for the corporation, prepared a written budget, and travelled to Washington to work with communications counsel on drafts of the application.

26. The record evidence (I.D., para. 111) also establishes that McDaniel is responsible for a significant financial investment in the application; *i.e.*, she is obligated to pay 20 percent of corporate expenses. The non-voting stockholders are obligated to pay 80 percent. As of the March 18, 1988 hearing session, Ms. McDaniel had paid 35% [the $6000 hearing fee and minor expenses] of the applicant costs, 15% above her equity obligation. Moreover, several written documents give McDaniel *de jure* control of the corporate applicant. The ALJ found (I.D. at paras. 90-91):

> James River's Articles of Incorporation provide, at para. 3, that the non-voting shares of stock entitle the holder to "no right to vote for the election of Directors or upon any other matter, or to receive notice or to participate in any meeting of the stockholders" (James River Ex. 1 at 2). This provision is subject to the exception that the consent as a class of the holder of non-voting stock is necessary to effect major changes in the basic structure of the corporation, such as (i) any alteration of the cor-

porate articles, (ii) a sale of all or substantially all of the corporate assets, or (iii) an approval by the corporation of any plan of merger (James River Ex. 1 at 2).

Pursuant to a Memorandum of Understanding between McDaniel and Fish, Fish will not serve as an officer or director of the corporation, will not be permitted to participate in the management or operation of the Corporation's business as an employee, consultant, or in any other capacity, and will not be retained to perform services of any sort for or on behalf of the corporation (James River Ex. 1 at 2).

27. In the *Forney* case, *supra*, the Commission held that *de jure* control established by written documentation could be rebutted by evidence that the alleged passive principals "have acted inconsistent with the [legal] agreement." Here, no such evidence was produced in this case; on the contrary, the ALJ found (I.D. at para. 119):

> The non-voting stockholders of James River had no involvement in the preparation of the application, the plan of staffing, the estimation of costs, or the selection of the site. The non-voting stockholders have had no decisionmaking role in the prosecution of the James River application or the supervision of local or FCC counsel's performance or in the authorization of payments to local or FCC counsel.

28. An applicant's comparative credit can also be reduced, the Commission has held, if "the totality of the circumstances undermine the credibility of the application." *Forney*, *supra*. Here, as in *Forney*, McDaniel has been the moving force behind the application, and is responsible for a significant financial investment in the application, acquiring 20% of the corporate stock including all of the voting stock. Later, she and the new 80% non-voting stockholder signed an agreement among stockholders which further insulates the "management or operation" of James River. *See* para. 26, above.

29. Our brief summary of the record evidence (which is more thoroughly detailed in the I.D. at paras. 92-131), when considered in the light of the Commission's standards of review, supports the ALJ's award of 100% quantitative credit to James River and his refusal "to infer that nonvoting stockholders' substantial financial commitments gave them a controlling interest in the station." *Forney*, 5 FCC Rcd 5427 at para. 27. We therefore affirm the ALJ's conclusion, which is supported by substantial record evidence, recalling that in *ClevelandTelevison Corp., v. FCC*, 732 F.2d 962, 969 (D.C. 1984), the Court declined "to order the Commission to disregard an applicant's corporate structure on the basis of mere suspicion . . . ."

30. Only Benns has filed exceptions (Br. 24) arguing that McDaniel has failed to establish how she can accommodate her other interests and still fulfill her commitment to work full-time at the proposed station. Benns arges that "McDaniel is a city council member and Vice-Mayor of the city and that she does not intend to divest those interests, *id.* 25, and "has not met her burden of proving that she can handle all her proposed responsibilites." *Id.*, at 26. Recently, we again emphasized in *Achernar Broadcasting Co.*, 5 FCC Rcd 6309, 6313, (Rev. Bd. 1990), "the Commission's expectation that applicants with outside employment or other interests [must] demonstrate how they will accommodate those activities so as to meet their full-time commitment to the station. *See Cuban-American Ltd.*, 5 FCC Rcd 3781, 3785 (1990)." Our review of the I.D. reveals that the ALJ applied the *Cuban-American* test in his consideration of this matter, I.D., paras. 262, 133-137.

31. His findings establish that McDaniel does expect to continue in her capacity on the Richmond city council, and that in the past she has spent "some twelve to fifteen hours of her time per month." *Id.*, at paras. 136-137, 262. During her time on the council, McDaniel has had no difficulty in carrying out her full-time obligations with the Medical College of Virginia, where she worked forty or more hours per week. (*Id.* at paras. 133-134) She also devoted some three hours per week as the Public Affairs Director of a Richmond radio station. *Id.* To satisfy her commitment to the proposed station, McDaniel pledged to sever her full-time employment at the Medical College, and her activities at the radio station.

32. In an analoguous case, *George Henry Clay*, 5 FCC Rcd 317, 319 (Rev. Bd. 1990), *recon. denied sub nom. Alabama Radio Movement, Inc.*, 5 FCC Rcd 2997 (1990), the Board affirmed an ALJ's award of integration credit to an individual who served as a county commissioner. The principal there devoted only a few hours per week to the position, in addition to his positions as a state university director of communications and public affairs, as well as a general manager of a public broadcast station. He pledged to relinquish his full-time positions in the event his application was granted. Here, the ALJ found that a full-time professional city manager is responsible for carrying out the law and policies set by the Richmond city council, and for running the city itself. I.D., para. 135. The council chooses the mayor and vice-mayor, and the mayor merely presides over the council meetings, and is the government head for ceremonial and military purposes, and for service of civil process. *Id.* The vice-mayor performs the duties of the mayor in the mayor's absence. *Id.* Each of the council members, and the mayor and vice-mayor, holds full-time jobs elsewhere. *Id.* As in *Clay*, nothing in the record undermines McDaniel's representation that she will work at least 40 hours per week managing the new station. Thus, she is entitled to the full-time credit awarded by the ALJ. We therefore affirm the ALJ's award of 100% quantitative credit to James River, which together with McDaniel's undisputed qualitative superiority justifies the grant of James River's application. *Id.*, at para. 274.

33. ACCORDINGLY, IT IS ORDERED, That the Request to Amend the Consolidated Exceptions to Initial Decision and Supporting Brief of Virginia Communications Limited Partnership, filed August 10, 1989 by Virginia Communications Limited Partnership IS GRANTED; that its Motion for Acceptance of Substituted Reply of Virginia Communications Limited Partnership to Exceptions, filed August 22, 1989 IS GRANTED; and that the Request for Special Relief and for Acceptance of Brief, filed November 22, 1989, by Dan J. Alpert IS DISMISSED as moot; and

34. IT IS FURTHER ORDERED, That the applications of Weyburn Broadcasting Limited Partnership (File No. BPH-851213MN), WKIE-FM, Inc. (File No. BPH-851216OA), Barbara B. Benns (File No. BPH-851216ON), Future Broadcast Limited Partnership (File No. BPH-

851216OV), WITJO Broadcasting, Inc. (File No. BPH-851216OX), Penny Drucker (File No. BPH-851216QB), and Virginia Communications Limited Partnership (File No. BPH-851216QE) for a new FM station to operate on 266A at Richmond, Virginia ARE DENIED; and that the application of James River Communications Corporation (File No. BPH-851216OO) IS GRANTED, subject to the following condition:

> Before program test authority is authorized by the Commission a fence must be erected at such distances and in such a manner as to prevent the exposure of humans to radio frequency radiation in excess of the American National Standards Institute Guidelines (OST Bulletin No. 65, October 1985). The fence must be of a type which will preclude casual or inadvertent access, and must include warning signs at appropriate intervals which describe the nature of the hazard. Permittee shall submit documentation of compliance with this special operating condition along with the Form 302, application for license, and the request for program test authority.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. CSS-87-012-LA

Application for authority to participate in the launch of the INMARSAT-II (F-2)

ORDER AND AUTHORIZATION

Adopted: February 11, 1991; Released: February 27, 1991

By the Chief, International Facilities Division:

1. The Commission has under consideration application, File Number CSS-87-012-LA, filed by the Communications Satellite Corporation (Comsat) on March 31, 1987, and supplemented on January 29 and February 4, 1991, for authority to participate in the launch and in-orbit testing of the modified INMARSAT-II (F-2) satellite.

2. The application was placed on the Commission's Public Notice on April 8, 1987. No comments were received.

3. The INMARSAT-II (F-2) was shipped from British Aerospace, Stevenage, U.K. by air transport and arrived at the launch site in Florida in mid-December 1990, and is scheduled to be launched on February 27, 1991, utilizing a Delta II commercial launch vehicle. This satellite will be drifted to its operating position of 15.5^0 West Longitude in the Atlantic Ocean Region (AOR). It is anticipated that the INMARSAT-II (F-2) will be in service by early April 1991.

4. The estimated costs associated with the INMARSAT-II (F-2) are as follows (all amounts in real year dollars):

BAe Contract (including delivery price, engineering changes and amendments, launch support and performance incentives)	$ 73.6 million
Delta Launch Vehicle and Services	$ 43.2 million
Insurance	$ 6.0 million
TOTAL INMARSAT	$122.8 million
TOTAL COMSAT (based on current ownership share of 24.9253%)	$ 30.6 million

5. In view of the foregoing and the need to provide the necessary satellite facilities to meet traffic requirements, we conclude that the public interest would be served by a grant of the subject request. Accordingly, Comsat is AUTHORIZED to participate in the launch and test program of the INMARSAT-II (F-2) satellite to be positioned at 15.5^0 West Longitude over the AOR, subject to the following terms and conditions:

(a) This authorization is limited to the described program. Any change in the authorized location due to a launch delay or other circumstances will be considered upon a proper request by Comsat for authority;

(b) Comsat shall furnish via the INMARSAT-II (F-2) only those channels of communication for commercial service which have been, or may be, authorized by the Commission under Section 214 of the Communications Act of 1934, as amended;

(c) Within 30 days after completion of the testing program, Comsat shall provide the Commission with a summary report of its results and upon request, shall make the detailed test data available;

(d) Conduct of the program authorized here shall be without interruption of commercial satellite service now authorized at U.S. earth stations;

(e) Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of the Commission; and

(f) Unless extended or modified for good cause, this authorization shall terminate six months after the release date of this order.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-5

In the Matter of

Amendment of Part 94 of the
Commission's Rules to Permit
Private Video Distribution
Systems of Video Entertainment
Access to the 18 GHz Band

REPORT AND ORDER

Adopted: February 13, 1991; Released: February 28, 1991

By the Commission:

I. INTRODUCTION

1. The Commission has before it a *Notice of Proposed Rule Making* (*Notice*) [1] issued in response to a Petition for Rule Making filed by Todd Integrated Systems, Inc. (Todd).[2] The *Notice* proposed to allow Operational-Fixed Microwave Service (OFS) licensees to use the 6 MHz wide, point-to-point channels in the 17.7-19.7 GHz (18 GHz) band to distribute video entertainment material. In addition, the *Notice* proposed not to limit the number of channels that may be assigned for this purpose.

2. In this *Report and Order*, we take final action amending our rules to reflect the proposals advanced in the *Notice*. This action represents a significant step in furtherance of our effort to encourage more robust competition in the multichannel video delivery marketplace. In other proceedings designed to facilitate this objective, we have removed barriers to the development of so-called "wireless cable" as a competitive market force, [3] clarified the definition of cable systems, which are required to obtain a franchise before being permitted to construct video distribution systems,[4] and encouraged Congress to enact legislation that will ease the entry of alternative multichannel video distributors into the marketplace.[5] The rules adopted in this *Report and Order* serve as a further extension of these efforts in two important respects. First, by having access to point-to-point frequencies at 18 GHz, alternative multichannel video providers eligible in the OFS will be able to expand their operations and increase their market presence. Elimination of the four-channel-per-transmitter-site limitation currently contained in Section 94.15(g) of our Rules, 47 C.F.R. § 94.15(g), is also necessary if these entities are to compete effectively with cable systems, which are typically able to offer at least fifty channels of video entertainment service. In turn, the emergence of OFS eligibles as viable competitors will serve the public interest by contributing to the development of a diversified and flexible industry.

II. BACKGROUND

A. Use of OFS frequencies for the Distribution of Video Entertainment Material

3. Our regulatory scheme for the Operational-Fixed Microwave Service generally restricts OFS licensees to the provision of point-to-point communications internal to a single organization for the purpose of conveying information and instructions related to the primary business of the licensee.[6] In 1981, the Commission began modifying this policy by permitting OFS licensees to use certain frequencies for the transmission of program material and other products and services, including video entertainment, to the licensees' customers.[7] In 1983, we further expanded the potential uses of OFS facilities by authorizing OFS licensees to utilize the point-to-multipoint frequencies in the 2500-2690 MHz band and frequencies above 21.2 GHz for the delivery of any of their own products and services to any receiving location, including hotels, apartment house master antenna television systems, and private residences.[8]

4. By relaxing the restrictions on the use of OFS frequencies, we invited new services eligible under Part 94 of our Rules to provide viable alternative sources of multichannel video entertainment distribution in competition with traditional cable systems. To compete effectively with cable systems, Satellite Master Antenna Television (SMATV)[9] operators and similar alternative multichannel distributors eligible to hold OFS licenses require access to spectrum that will enable them to deliver the signals they receive via satellite to various receiving locations. Because of current limitations in our OFS rules, many alternative multichannel delivery systems are required to construct separate head-end facilities at each location they wish to serve.[10] Financial constraints, zoning restrictions, terrestrial interference, satellite line-of-sight problems and building owner restrictions often preclude the installation of numerous separate head-end facilities, thwarting the growth of these operations.[11] Such constraints upon the physical expansion of OFS systems in turn foil the market expansion of OFS eligibles, decreasing their competitive potential. The assignment of appropriate microwave spectrum would reduce the impact of these problems.

B. Notice of Proposed Rule Making

5. In June of 1987, Todd, an OFS eligible and the owner/operator of several SMATV systems in the New York City area, filed its Petition for Rule Making. Todd requested that the Commission permit OFS eligibles to use the 6 MHz wide channels in the 18 GHz band for the distribution of video entertainment material without limiting the number of channels that may be assigned for this purpose. Our subsequent *Notice* proposed to grant Todd's Petition in both of these respects. Although cognizant of the fact that alternative multichannel operators eligible in the OFS could possibly satisfy their needs on frequencies above 21.2 GHz, we stated that the 18 GHz band is better suited for video operations because the current channeling plan at 18 GHz contains seventy-three 6 MHz wide channels that are available for video distribution by licensees in the Cable Television Relay Service (CARS)[12] and because affordable equipment already exists at 18 GHz for CARS operation.

6. We solicited comment on our proposals and specifically requested commenters to address whether we should allow the distribution of video entertainment material over the entire 18 GHz band or whether such transmissions should be restricted to the available 6 MHz wide channels. On this matter, we expressed our tentative position that it would be more spectrum efficient to restrict these operations to the 6 MHz wide channels, noting that although the 18 GHz band is not heavily congested at this time, we anticipate that it will grow more congested as other frequency bands become saturated. In proposing to amend the four-channel-per-transmitter-site limitation, we noted that allowing the use of 18 GHz frequencies for the distribution of video entertainment material will do little to improve the competitive viability of alternative video entertainment providers unless they are able to provide customers a diverse range of programming equal to that offered by cable system competitors.[13]

7. In response to the *Notice*, we received 47 comments and 8 reply comments. (A complete list of parties filing comments in this proceeding is attached as Appendix B.) Alternative multichannel video distributors responding to the *Notice* express unanimous support for our proposal to permit OFS eligibles to deliver video entertainment material in the 18 GHz band.[14] Several manufacturers of equipment used to facilitate these transmissions also support this aspect of the *Notice*.[15] In addition, a majority of these commenters favor our proposal to restrict such use of the 18 GHz band to the available 6 MHz wide channels.[16] Others, however, do not agree with being so restrictive.[17] A number of commenters also favor our plan to eliminate the four-channel-per-transmitter-site limitation as it pertains to the distribution of video entertainment material in the 18 GHz band.[18] Commenters opposed to the overall thrust of the *Notice* generally express the concern that permitting OFS distribution of video entertainment material in the 18 GHz band could limit future availability of the frequencies in this band for other microwave operations, adversely affecting potential and existing users.[19]

III. DISCUSSION

A. OFS Access to 18 GHz Frequencies For Distribution of Video Entertainment Material

8. Those commenters favoring our proposal to permit OFS eligibles to distribute video entertainment material in the 18 GHz band advance three primary arguments in this regard: (1) that SMATVs and similar entities require additional spectrum to compete effectively with traditional cable systems;[20] (2) that spectrum at 18 GHz is underutilized;[21] and (3) that spectrum at 18 GHz is more suitable than other available spectrum to satisfy the needs of OFS operators.[22] Opposing commenters express the concern that the adoption of this proposal may limit the future availability of 18 GHz frequencies for more traditional microwave operations.[23] In addition, a number of these commenters suggest that it has not adequately been shown that the proposal serves the public interest because there is no demonstrable need for additional sources of video entertainment distribution.[24]

9. After carefully reviewing the record, we conclude that the adoption of this proposal, particularly in conjunction with our concomitant proposal to eliminate the four-channel-per-transmitter-site limitation, will promote the public interest by encouraging competition in the video distribution marketplace. The need for such action is well documented. This Commission recently conducted a review of marketplace developments in the video distribution industry in which we concluded that cable systems possess a disproportionate share of market power and, therefore, are capable of engaging in anticompetitive conduct.[25] In these circumstances, competition provides the most effective safeguard against the specter of market power abuse. As competition from alternative multichannel providers such as second competitive cable operators, wireless cable/multi-point distribution services, SMATV systems, and direct broadcast satellites (DBS) emerges, we find that it would serve the public interest to encourage these rival operators to enter the market and to enhance their competitive potential.

10. As indicated, our decision promotes this objective by responding to alternative video providers' requests for access to spectrum that will permit them to transmit the signals they receive at an earth station at one location to other locations, or to conduct wideband transmissions between buildings, by use of a microwave link. Frequencies at 18 GHz are ideal for OFS distribution of video entertainment material from a technological standpoint because the 18 GHz band is already used for this purpose by CARS operators. The availability of equipment for CARS operation will result in lower equipment costs for video entertainment providers eligible in the OFS, allowing these entities to expand their operations affordably.[26]

11. Moreover, the basis for our initial decision to prohibit OFS licensees from using spectrum below 21.2 GHz for the distribution of video entertainment material has eroded, lending additional support to the conclusion that the public interest will be enhanced by the adoption of our proposal.[27] In Docket No. 19671, we indicated our belief that the delivery of video entertainment material would not be feasible in bands below 21.2 GHz because of the anticipated heavy occupancy of those bands by existing point-to-point operators.[28] Significantly, our concern with the heavy occupancy of bands below 21.2 GHz (in particular, 13.2-13.25 GHz and 18.36-19.04 GHz) stemmed in substantial part from the anticipated migration to these bands of numerous OFS licensees displaced from 12.2-12.7 GHz by the reallocation of this spectrum to the Direct Broadcast Satellite (DBS) Service.[29] As noted in the comments and in the *Notice*, however, the extent of anticipated migration has not materialized.[30] The 12 GHz licensees were given the option of retaining their existing licensed facilities on a secondary basis to DBS, or relocating their operations on a preferential basis during a five-year accommodation period.[31] This accommodation period ended September 9, 1988. Only an insignificant number of 12 GHz licensees affected by the DBS reallocation have relocated to the 18 GHz band.[32] Although the five year accommodation period offered a sufficient amount of time for those licensees wishing to do so to have relocated their operations, we note that they still have access to the 18 GHz band, albeit on an equal basis with other OFS eligibles. In our view, continuing to reserve 18 GHz spectrum for these licensees when faced with the demonstrated demand of other microwave users for frequencies at 18 GHz is flatly inconsistent with our statutory obligation to promote the larger and more effective use of the radio spectrum.[33]

12. In addition, at this juncture we wish to underscore that the use of 18 GHz frequencies authorized herein will not render entities eligible for this spectrum "cable systems" within the meaning of 47 U.S.C. § 522(6). Pursuant to 47 U.S.C. § 541(b)(1), firms seeking to construct and operate "cable systems" as defined in Section 522(6) must first obtain a franchise from the state government or its local designate.[34] In MM Docket No. 89-35,[35] we stated affirmatively that the term "cable system" contained in 47 U.S.C. § 522(6) encompasses only video delivery systems that provide service to subscribers via wire or other physically closed or shielded transmission paths. We found that this term explicitly excluded radio services such as MDS, ITFS and OFS that do not use closed transmission paths outside of individual buildings. Likewise, we found that SMATV and MATV systems that use wire or cable solely within the premises of an individual multiple unit dwelling or that serve more than one multiple unit dwelling interconnected only by radio or infrared facilities are outside the definition of a "cable system." We noted, however, that the use of a wire or cable to interconnect MATV or SMATV-equipped buildings would render the system a cable system unless the several buildings are commonly owned, controlled or managed and the system's physically closed interconnection paths do not use a public right-of-way.[36] Furthermore, we clarified that electromagnetic radiation, in passing above, across or through a public right-of-way does not "use" that right-of-way within the meaning of Section 522(6). The transmissions authorized in the instant proceeding fall into this latter category. It therefore follows that entities seeking to construct video distribution systems using OFS transmissions are not required under 47 U.S.C. § 541(b)(1) to obtain a franchise unless they also connect properties via some type of physically closed transmission path such as wire, coaxial cable or fiber optics and do not fall within the common ownership/no public right-of-way exception.[37]

B. Restriction of Transmissions to the 6 MHz wide Channels

13. We have concluded that limiting OFS distribution of video entertainment material in the 18 GHz band to the 6 MHz wide, point-to-point channels is appropriate because it will foster the most efficient use of spectrum. In addition, this limitation is consistent with the availability of the 6 MHz wide channels for video distribution by CARS licensees.[38] We are sensitive to the concerns expressed by certain commenters with respect to the availability of amplitude modulation equipment and the desirability of being able to employ alternative forms of modulation.[39] We believe, however, that the limited availability of amplitude modulation equipment for use at 18 GHz is due to the fact that there has been little demand for such equipment rather than because of any intrinsic problem with the operation of such equipment in this frequency range.[40] Of more crucial concern is the management of the finite amount of available spectrum. As demonstrated in the *Notice*, an SMATV operator seeking to distribute video material over twenty channels using frequency modulation techniques would need over 400 MHz of spectrum per link. In contrast, we noted that by permitting distribution of video transmissions on the 6 MHz wide channels, the same SMATV operator using amplitude modulation techniques would require only 120 MHz of spectrum per link.[41] Balancing the costs associated with such extensive consumption of spectrum against the relative benefits to licensees from the use of alternative modulation techniques, we conclude that the restriction of video entertainment transmissions to the available 6 MHz wide channels best serves the public interest.[42] We note, however, that pursuant to Section 94.63 of our Rules, 47 C.F.R. § 94.63, applicants must follow the prior coordination procedure specified in Section 21.100(d), 47 C.F.R. § 21.100(d).

C. Limitation of Frequencies per Site

14. In addition, we conclude that amendment of Section 94.15(g) of our Rules is necessary to enable alternative multichannel operators eligible in the OFS to reap any tangible benefits from their access to frequencies at 18 GHz for the distribution of video entertainment material.[43] The comments submitted in this proceeding demonstrate that permitting OFS access to 18 GHz for this purpose without removing the four-channel-per-transmitter-site limitation does virtually nothing to improve the viability of OFS eligibles competing with cable system operators capable of offering at least fifty channels.[44] To provide meaningful competition to cable systems, alternative multichannel operators must be permitted to transmit as many video channels as necessary to meet subscriber demand and to vie with competitors' offerings. The amendment of Section 94.15(g) is a necessary step toward this end. Furthermore, we conclude that no preset limit should be placed on the number of channels OFS eligibles are allowed to utilize at 18 GHz for the delivery of video entertainment material.[45] Imposing a limitation on the number of channels available for OFS use with no corresponding limitation on the distribution capacity of cable systems would be inconsistent with our goal of creating a truly competitive marketplace.[46]

D. Clarification of Existing Rules

15. In the *Notice*, we proposed to clarify 47 C.F.R. § 94.15(g) to reflect our practice of interpreting the rule to permit licensees on frequencies below 21.2 GHz to be assigned four channels at each transmitter site while permitting licensees on frequencies above 21.2 GHz to obtain four frequencies per path per transmitter site.[47] We now take final action amending Section 94.15(g) in this manner. In addition, we take this opportunity to clarify the related provision, Section 94.9 of our Rules, 47 C.F.R. § 94.9. Although we have not issued a notice of proposed rule making with respect to this action, these rule changes are minor and non-controversial, and we thus find good cause for concluding that notice and comment is unnecessary.[48] These clarifications are reflected in the attached Appendix A.[49]

IV. CONCLUSION

16. In conclusion, cable systems increasingly dominate the multichannel video delivery services, resulting in criticism of the industry and complaints of anticompetitive conduct. Although rival multichannel providers are emerging in the marketplace, we recognize the need for action designed to encourage these operators to enter the market and to increase their competitive viability. To improve the competitive potential of alternative multichannel providers eligible to hold licenses in the Operational-Fixed Microwave Service, we take action in this proceeding permitting the use of the 6 MHz wide, point-to-point channels in the 18 GHz band for the dis-

tribution of video entertainment material. We also amend our rules to eliminate the restriction on the number of channels that may be assigned for this purpose. This action serves the public interest by encouraging the growth of competitive alternatives to cable systems and by providing consumers with a diverse range of video distribution services. In addition, the action taken herein furthers the best interest of the public by promoting spectrum efficiency and increasing the flexibility of licensees.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

17. The Commission is adopting this *Report and Order* to permit OFS eligibles to distribute video entertainment programming in the 18 GHz band without restricting the number of channels that may be used for this purpose. This action will foster the growth of alternative multichannel delivery systems by enabling them to compete effectively with cable service offerings. By promoting competition in the local distribution of video entertainment programming, the Commission increases the range of video distribution alternatives available to consumers. No comments were received that specifically addressed the Initial Regulatory Flexibility Analysis contained in our *Notice* pursuant to 5 U.S.C. § 603. Numerous operators of alternative multichannel delivery systems did, however, comment that adoption of our proposals would enable them to provide service in a more efficient, cost-effective manner and to better compete with cable offerings. A few commenters also indicated that OFS use of the 18 GHz band should be reserved for more traditional microwave uses.

18. One primary alternative to this action was suggested by commenters. Such traditional users of microwave as utilities, railroads and the petroleum industry support limiting distribution of video entertainment programming to OFS frequencies above 21.2 GHz. Based on the record of this proceeding, we find that the 18 GHz band can adquately accommodate the communications needs of diverse OFS users. Furthermore, we find the 18 GHz band is better suited for video entertainment distribution.

VI. PAPERWORK REDUCTION ACT STATEMENT

19. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and has been found to contain no new or modified form, information, collection and/or recordkeeping, labeling, disclosure or record retention requirements, and will not increase the burden hours imposed upon the public.

VII. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 94 of the Commission's Rules, 47 C.F.R. Part 94, IS AMENDED as set forth in Appendix A below, *effective* thirty days after publication of this Order in the Federal Register.

21. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

47 C.F.R. Part 94 is amended as follows:

1. The authority citation for Part 94 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082, 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 C.F.R. § 94.9 and the section heading are revised in their entirety to read as follows:

§ 94.9 Permissible Communications.

(a) Except as provided in paragraph (b) of this section, stations in this radio service may transmit communications as follows:

(1) On frequencies below 21,200 MHz, licensees may transmit their own communications, including the transmission of their products and information services, to their customers except that the distribution of video entertainment material to customers shall be permitted only as indicated in § 94.61(b) and subparagraph (a)(2) of this section.

(2) In the frequency bands 6425-6525 MHz, 18,142-18,580 MHz and on frequencies above 21,200 MHz, licensees may deliver any of their own products and services to any receiving location;

(3) Licensees may transmit the communications of their parent corporation, or of another subsidiary of the same parent, or their own subsidiary where the party to be served is regularly engaged in any of the activities that constitute the basis for eligibility to use the frequencies assigned;

(4) Licensees may transmit the communications of other parties in accordance with § 94.17;

(5) Licensees may transmit emergency communications unrelated to their activities in accordance with § 94.11;

(6) Licensees may transmit communications on a commercial basis to eligible users, among different premises of a single eligible user, or from one eligible user to another as part of transmissions by Digital Termination Systems on the frequencies provided for this purpose;

(7) Licensees may transmit program material from one location to another, provided that the frequencies do not serve as the final RF link in the chain of distribution of the program material to broadcast stations;

(8) The facilities of closed circuit educational television systems that have been licensed to educational institutions may be utilized for the transmission of program material to noncommercial educational broadcast stations, provided that the use of the facilities exclusively for carrying such program material shall be less than 50 percent of their total use during any one year of the license period, no charge either direct or indirect shall be made for such use, and licensees shall submit reports with their applications for renewals showing the breakdown of usages in terms of primary and alternate uses during each year of the license term.

(b) Stations licensed in this radio service shall not:

(1) Render a common carrier communications service of any kind.

(2) Transmit program material for use in connection with broadcasting, except as provided in subparagraphs (a)(7) and (a)(8) of this section.

(3) Be used to provide the final RF link in the chain of transmission of program material to cable television systems, multipoint distribution systems or master antenna TV systems, except in the frequency bands 6425-6525 and 18,142-18,580 MHz and on frequencies above 21,200 MHz.

3. 47 C.F.R. § 94.15 is amended by revising paragraph (g) to read as follows:

§ 94.15 Policy governing the assignment of frequencies.

* * * * *

(g) Except as provided in this paragraph and paragraph (h) of this section, applicants for frequencies below 21,200 MHz are normally limited to four transmit frequencies per band per transmitter site. Applicants for frequencies above 21,200 are limited to four transmit frequencies per path per transmit location. Further, master and remote stations using frequencies listed in § 94.65(a)(1) will not normally be authorized more than four (12.5 kHz) frequencies or frequency pairs. Licensees distributing multichannel video entertainment material on the frequencies identified in § 94.65(j)(3) are not restricted in the number of channels or the number of paths originating from any one site they may be licensed to use for this purpose.

* * * * *

4. 47 C.F.R. § 94.61(b) is amended by revising the entry for the frequency band 17700 to 18580 to read as follows:

§ 94.61 Applicability.

* * * *

(b) * * *

FREQUENCY BAND (MHz)	
* * * * *	
17700-18580 . . .	(6) (8) (10) (23) (27)
* * * * *	

APPENDIX B

Comments

Frank C. Accardo
American Cablecom, L.P., and Xcel Cablesystems, L.P.
The Association of American Railroads
B & H Antenna Systems
Casden Cable
Channel Master
CoitCom Communication Specialists
Dial One Antennas by Frank
Diversified Cable, Ltd.
Eastern Satellite Television, Inc.
ESCOA
The Farash Corporation
Harris Corporation, Farinon Division
Hotel Vision
Leisure Time Cable Co.
Liberty Cable, Inc.
Marco Realty and Management Co.
M/A-COM MAC, Inc.
Mehlich Electronics, Inc.
Mid-Atlantic Cable
National CableSystems Associates
The National Cable Television Association, Inc.
The National Private Cable Association, Beach Communications, Inc., Dorn Communications, Inc., MaxTel Cablevision, Millisat, Inc., NuMarket Cable Systems, Inc., Pacific Cablevision, Western Cable Communications, Inc., and Western Cable Systems, Inc. (collectively referred to as NPCA)
The National Satellite Programming Network, Inc., Beach Communications, Mid-Atlantic Communications, Inc., Stellar Communications, Inc., Telecom Satellite Systems Corp., Telesat Cablevision, Inc, and Twenty-first Century Technology Group, Inc. (collectively referred to as the Joint Commenters)
O.D. Page
Prime Time Entertainment
R & R Technologies, Inc.
Richey Pacific Cablevision
SatCom Systems, Inc.
Spectradyne, Inc.

Roy J. Stumpf
SWC Cable, Inc.
Tele-Communications, Inc.
Todd Integrated Systems, Inc.
Trammel Crow Company
United Satellite/America, Inc.
The Utilities Telecommunications Council
WAV, Inc.
Western Cable Communications, Inc.
The Wireless Cable Association, Inc.

Reply Comments

The American Petroleum Institute
Hughes Aircraft Company Microwave Communications Products
The National Cable Television Association, Inc.
The National Private Cable Association
Telecom Sciences, Inc., and Motorola Microwave
Tele-Communications, Inc.
Todd Integrated Systems, Inc.
The Wireless Cable Association, Inc.

FOOTNOTES

[1] Notice of Proposed Rule Making, PR Docket No. 90-5, 5 FCC Rcd 461 (1990).

[2] Petition for Rule Making, RM-6014, filed June 8, 1987.

[3] *See generally* Report and Order and Further Notice of Proposed Rule Making, Gen. Docket Nos. 90-54, 80-113, 5 FCC Rcd 6410 (1990). We use the term "wireless cable" for convenience only and do not mean to suggest that such systems are cable systems for any statutory or regulatory purpose. *See* para. 12, *infra*.

[4] *See* Report and Order, MM Docket No. 89-35, 5 FCC Rcd 7638 (1990).

[5] *See* Report, MM Docket No. 89-600, 5 FCC Rcd 4962 (1990).

[6] *See* Memorandum Opinion and Order, Docket No. 19671, 99 FCC 2d 715, 716 (1983). OFS licensees are governed by Part 94 of our Rules. Stations licensed under this Part are not open to public correspondence and are generally operated by and for the exclusive use of persons or agencies eligible to operate their own radiocommunication facilities. Part 94 eligibility is limited to those entities qualified for licensing in radio services under Part 80 (Maritime Services), Part 87 (Aviation Services) and Part 90 (Private Land Mobile Radio Services). *See* 47 C.F.R. § 90.3. Under 47 C.F.R. § 94.17(a), however, private carriers may share the facilities of OFS licensees provided that the various requirements of Section 94.17 are satisfied.

[7] First Report and Order, Docket No. 19671, 86 FCC 2d 299, 308 (1981).

[8] Memorandum Opinion and Order, Docket No. 19671, 99 FCC 2d at 728. Entities eligible to use OFS frequencies for these purposes are required to have an ownership or contractual interest in the information or services they distribute. First Report and Order, Docket No. 19671, 86 FCC 2d at 309.

[9] SMATV is a service provided in apartment buildings, condominiums, hotels and similar multi-unit buildings that utilizes wire or cable to deliver throughout the building signals received on a satellite antenna.

[10] Although our rules permit OFS distribution of video entertainment material on frequencies above 21.2 GHz, multichannel distributors eligible to use OFS frequencies have generally been unable to use this spectrum because the high cost of equipment needed for transmissions at 21 GHz can be justified only if numerous persons are served. *See, e.g.*, Comments of Cablecom at 5-6.

[11] For example, Liberty Cable, Inc., states in its comments that the high cost of installing a head-end at each property is a significant barrier to the expansion of its SMATV service and suggests that the use of 18 GHz spectrum to connect SMATV systems could remove the cost barrier to expansion in large urban areas. Liberty estimates that by replacing a head-end with 18 GHz transmitters and receivers, the cost of receiving and distributing video signals will decrease by as much as $ 80,000 per system. Commenting on the competitive advantages resulting from such a reduction in cost, Liberty adds that as its head-end costs decrease, the size of the multi-family buildings it can serve also decreases, causing a corresponding increase in its market potential. Comments of Liberty Cable, Inc., at 3-5; *see also* Comments of Todd at 9-10.

[12] Stations licensed under the following Parts of our Rules may use the 18 GHz band: (1) Part 21, Domestic Public Fixed Radio Services and Digital Electronic Message Service; (2) Part 25, Satellite Communications; (3) Part 74, Experimental, Auxiliary, and Special Broadcast and Other Program Distributional Services; (4) Part 78, Cable Television Relay Service; and (5) Part 94, Private Operational-Fixed Microwave Service. CARS stations are fixed or mobile stations "used for the transmission of television and related audio signals, signals of standard and FM broadcast stations, signals of instructional television fixed stations, and cablecasting from the point of reception to a terminal point from which the signals are distributed to the public." 47 C.F.R. § 78.5(a).

[13] *Notice*, 5 FCC Rcd at 462-63. In addition, we proposed to clarify Section 94.15(g) to reflect our past practice of interpreting that section as permitting licensees on frequencies below 21.2 GHz to be assigned four channels at each transmitter site while permitting licensees on frequencies above 21.2 GHz to obtain four frequencies per path per transmitter site. *See infra* para. 15.

[14] *See, e.g.*, Comments of Todd Integrated Systems, Inc., (Todd); WAV, Inc.; American Cablecom, L.P., and Xcel Cablesystems, L.P., (referred to collectively as Cablecom); The Wireless Cable Association, Inc., (WCA) and the National Private Cable Association.

[15] *See, e.g.*, Comments of Channel Master; M/A-COM MAC, Inc., (Mac); Harris Corporation, Farinon Division (Harris Corporation); and Reply Comments of Hughes Aircraft Company, Microwave Communications Products (Hughes-MCP).

[16] *See, e.g.*, Comments of Cablecom; Harris Corporation; NPCA; Associates; and Reply Comments Hughes Aircraft Company.

[17] *See, e.g.*, Comments of Liberty Cable, Inc.; Spectradyne, Inc.; and Mac. Todd urges the Commission to consider the alternative of granting access to the entire 18 GHz band.

[18] *See, e.g.*, Comments of Todd; Cablecom; Harris Corporation; NPCA; Associates; Liberty Cable, Inc.; and Spectradyne, Inc.

[19] *See, e.g.*, Comments of The Association of American Railroads (AAR); Utilities Telecommunications Council (UTC); and Reply Comments of the American Petroleum Institute (API) and Telecom Sciences, Inc. and Motorola Microwave (Telecom/Motorola Microwave). The National Cable Television Association, Inc., (NCTA), and Tele-Communications, Inc.,

(TCI), express a similar concern but instead of opposing our proposal, suggest the imposition of certain restrictions on OFS operation in the 18 GHz band. *See infra* n. 33.

[20] *See* Comments of Todd at 9-10; Comments of Cablecom at 5; Comments of Liberty Cable, Inc., at 5; Comments of NPCA at 3; Comments of Joint Commenters at 6; Comments of WAV, Inc., at 2-3; Comments of National CableSystems Associates at 1. The Joint Commenters urge us also to permit OFS access to the 12 GHz CARS bands for the transmission of video programming. *See* Comments of Joint Commenters at 10-12. Because this suggestion is outside the scope of this proceeding, we decline to address it. *See, e.g.*, Report and Order, Gen. Docket No. 89-295, 5 FCC Rcd 3954, 3957 (1990) (this Commission may not consider issues outside the scope of the proceeding in question).

[21] *See* Comments of Todd at 6; Comments of Channel Master at 2; Reply Comments of Hughes Aircraft Company at 3.

[22] *See* Comments of Cablecom at 5-6; Comments of Todd at 6.

[23] *See, e.g.*, Comments of the Association of American Railroads (AAR) at 2; Comments of the National Cable Television Association, Inc., (NCTA) at 4; Comments of Telecommunications, Inc., (TCI) at 3; Reply Comments of Telesciences/Motorola Microwave at 4; Comments of the Utilities Telecommunications Council (UTC) at 5.

[24] *See* Comments of UTC at 5; Reply Comments of the American Petroleum Institute (API) at 11; Reply Comments of Telesciences/Motorola Microwave at 3.

[25] *See* Report, MM Docket No. 89-600, 5 FCC Rcd at 4972.

[26] *See* Comments of Cablecom at 5-6; *see also* Comments of Channel Master at 3; Reply Comments of Hughes Aircraft at 3 n. 3. Both Channel Master and Hughes Aircraft indicate their willingness to begin supplying 18 GHz equipment suitable for OFS distribution of video entertainment material.

[27] *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 435 U.S. 829 (1977)(governmental regulations that cannot be justified must not be retained).

[28] Memorandum Opinion and Order, Docket No. 19671, 99 FCC 2d at 725-26. *See also* Notice of Proposed Rule Making, PR Docket No. 88-191, 3 FCC Rcd 3532, 3536 (1988).

[29] *See* Memorandum Opinion and Order, Docket No. 19671, 99 FCC 2d at 726.

[30] *See Notice*, 5 FCC Rcd at 462. *See also* Comments of Todd at 8; Comments of NPCA at 8-9.

[31] *See* First Report and Order, Gen. Docket No. 82-334, 54 R.R. 2d 1001 (1983).

[32] Licensing records maintained by the Private Radio Bureau indicate that the majority of OFS displacees have not relocated their operations. Nevertheless, we note that the primary alternative source in the 18 GHz band (*e.g.*, the 18 GHz wideband channels) for filling the void of 12 GHz spectrum is not being made available in this proceeding for video entertainment distribution.

[33] *See* 47 C.F.R. § 303(g). For this same reason, we are not persuaded by the arguments advanced by the Association of American Railroads, the National Cable Television Association, Inc., and Telesciences/Motorola Microwave concerning the effect of our proposal upon the future needs of existing and potential 18 GHz licensees. *See* Comments of AAR at 2; Comments of NCTA at 4; Comments of Telesciences Motorola/Microwave at 4. *See also* Comments of TCI at 3; Reply Comments of API at 8. OFS use of 18 GHz frequencies for the delivery of video entertainment material will reduce to some extent the supply of this spectrum available for other users. This result is not, however, detrimental to the public interest. We believe that spectrum at 18 GHz can be used to satisfy the needs of all of these licensees. In this connection, we also note that the frequencies at issue in this proceeding will continue to be available for non-video microwave uses and that applications for such uses will continue to be processed on a first-come, first-served basis with no priority being afforded to applications to use these frequencies for the distribution of video entertainment material. *See* Report and Order, PR Docket 88-191, 5 FCC Rcd 1220, 1224 (1990).

[34] Franchising requirements have proved problematic for alternative multichannel operators because they are often used to discourage or even forbid competition for reasons having little to do with appropriate governmental interests. *See* Report, MM Docket No. 89-600, 5 FCC Rcd at 4973.

[35] Report and Order, MM Docket No. 89-35, 5 FCC Rcd 7638 (1990).

[36] 47 U.S.C. § 522(6)(B) excludes from the definition of a cable system a facility that "serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way . . . ."

[37] Liberty Cable also asks us to preempt state regulation of video entertainment distribution in the 18 GHz band. *See* Comments of Liberty Cable, Inc, at 8-12. Because the issue of preemption was not raised in the *Notice*, it is outside the scope of this proceeding. Moreover, our decision in MM Docket No. 89-35 appears to remedy Liberty's concerns. In response to the suggestion advanced by Tele-communications, Inc., that the frequency coordination procedures for 18 GHz services be uniform and embrace the procedures set forth in Part 21 of our Rules, *see* Comments of TCI at 4, we note that 47 C.F.R. § 94.63 already contains this requirement. Likewise, our existing rules encompass the suggestions advanced by certain commenters that we prohibit the use of omnidirectional transmission antennas in the frequencies at issue in this proceeding, and that we require transmission antennas used for the operations authorized herein to satisfy the standards delineated in 47 C.F.R. § 94.75(b). *See* Comments of WCA at 14 n. 20; Reply Comments of TCI at 3.

[38] Most commenters agree. *See, e.g.*, Comments of Harris Corporation at 2; Comments of Cablecom at 2; Comments of NPCA at 10; Comments of TCI at 4; Comments of AAR at 3; Comments of UTC at 9; Reply Comments of Hughes-MCP at 2; Reply Comments of Telesciences/Motorola Microwave at 5; Reply Comments of API at 12.

[39] *See* Comments of Liberty Cable, Inc., at 5; Comments of Spectradyne, Inc., at 8. *See also* Comments of Todd at 6; Comments of M/A, COM MAC, Inc., at 3. Favoring access to the entire 18 GHz band, both Liberty Cable, Inc., and Spectradyne, Inc., contend that the 6 MHz restriction may impair the ability of alternative operators to compete by placing the appropriate equipment and channel capacity in short supply.

[40] *See* Comments of Hughes-MCP at 4. Hughes-MCP and Channel Master, both developers and manufacturers of microwave communications products, indicate in their comments that they are ready and able to manufacture 18 GHz VSB-AM equipment. Comments of Hughes-MCP at 1,3; Comments of Channel Master at 2.

[41] *Notice*, 5 FCC Rcd at 462.

[42] Furthermore, we agree with the National Private Cable Association, which contends that amplitude modulation techniques requiring only 6 MHz of bandwidth per channel minimize the amount of spectrum needed per link, rendering use of the 6 MHz wide frequencies optimally cost and spectrum efficient. Comments of NPCA at 10. We also find merit in Cablecom's suggestion that the 6 MHz restriction has the benefit

of encouraging standardization of equipment, resulting in the eventual reduction of the cost of AM equipment for the 18 GHz band. Comments of Cablecom at 7.

[43] We decline to accept various commenters' invitation to eliminate the four-channel-per-transmitter-site limitation as it pertains to OFS use of frequencies in the 23 GHz band. *See, e.g.*, Comments of Spectradyne at 4-6; Comments of NPCA at 7; Reply Comments of Todd at 5; Comments of Harris Corporation at 3. This request is outside the scope of the instant proceeding. We note, however, that licensees seeking to obtain relief from Section 94.15(g) in bands other than 18 GHz may request waiver of the rule in accordance with the terms of 47 C.F.R. § 90.151. Likewise, although the National Cable Television Association, Inc., urges us to take action subjecting alternative multichannel operators licensed in the OFS to the same public interest and signal leakage requirements as those imposed on cable systems, we refrain from doing so because this too is a matter outside the scope of the instant proceeding.

[44] *See, e.g.*, Comments of Todd at 8; Comments of NPCA at 6; Comments of Cablecom at 8; Comments of Associates at 3; Comments of Spectradyne at 4; Comments of Harris Corporation at 3.

[45] The Wireless Cable Association, Inc., (WCA) suggests that the Commission place some limitation of the number of channels OFS licensees are able to use. *See* Comments of WCA at 12-13.

[46] Although various commenters urge us to implement rules designed to prevent spectrum speculation and warehousing, particularly by private entrepreneurial carriers, we are confident that our existing operating requirements, *see* 47 C.F.R. § 94.47(b), adequately protect against these concerns. Moreover, in response to the suggestion advanced by these commenters that we prohibit private carrier operation in the 18 GHz band, *see* Comments of WCA at 14-16; Reply Comments of Todd at 10, we find it necessary to underscore that the frequencies at issue in this proceeding are available to all OFS licensees whether or not they are engaged in the distribution of video entertainment material. We will not entertain proposals seeking to frustrate access to this spectrum.

[47] *Notice*, 5 FCC Rcd at 462.

[48] *See* 5 U.S.C. § 553(b)(B).

[49] Also in this connection, we note that the phrase "multipoint distribution systems" used in Section 94.9(b)(3), 47 C.F.R. § 94.9(b)(3), refers to licensees in the multipoint distribution service as defined in Part 21 of our Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 21, 1991

CONSUMER ALERT
TELEPHONE CALLS FROM THE PERSIAN GULF -- WHAT TO DO WHEN THE BILL COMES DUE

Several telephone companies are providing telephone service from the Persian Gulf, enabling U.S. military personnel to telephone home, even from remote desert locations. Except for occasional promotions during special holidays, these calls are not free.

Many families of military personnel stationed in the Mideast are now receiving bills, sometimes amounting to several hundred dollars, for calls placed by relatives and friends serving in the Mideast. The Federal Communications Commission is working with carriers to lower rates, particularly from locations in Saudi Arabia where most U.S. troops are stationed.

As of February 22, 1991, you can expect to pay between $11.50 and $20 for a 10 minute call from Saudi Arabia depending upon the payment arrangement associated with the call, *e.g.*, collect, calling card, or credit card, and the carrier handling the call.

The Federal Communications Commission offers the following advice for those with relatives and friends serving in the Persian Gulf war --

o It's less expensive for the person paying the bill if your relative or friend in the Gulf uses a calling card, instead of calling collect.

o If you have not yet received a bill, you can estimate your charges based on the rates the carriers have filed with the FCC. Over the past few months, the charge for setting up collect calls has been between $5.00 and $5.75, the initial minute charge for all calls has been between $2.99 and $3.19, and the charges for subsequent minutes have ranged from $1.15 to $1.45 per minute. After February 22, 1991, the charge for setting up a collect call and initial minute charges for calls made on AT&T's network will be lower. MCI decreased its rates February 15, 1991.

o Questions about bills should be directed to your local telephone company business office, or to the international carrier who provided the service. Inquiries about calls sent through AT&T can be directed to a 24-hour toll free number AT&T has established to handle such inquiries: 1-800-323-HELP. Questions about bills for calls sent through MCI can be directed to MCI's toll free number: 1-800-7ASK-HELP between 9 a.m. and 9 p.m. weekdays and 9:30 a.m. and 5:30 p.m. Saturdays. Inquiries about bills from Military Communications Center (MCC) can be directed to 1-612-942-2900.

o If you have a bill that you can't pay immediately, call your local telephone company and work out a payment schedule with them. Many local companies have stated they are willing to extend payment over longer than normal periods to accommodate you. If you receive a bill directly from the international carrier, contact them.

o Remember that payment notices are often generated by an automated billing process that cannot determine if the size of your bill stems from calls you are receiving from the Persian Gulf. You must contact your billing representative to request special treatment.

o If you are being threatened with service disconnect, and your local telephone company has not worked with you to develop a payment schedule, contact your state regulatory agency, usually listed as a "public service commission" or "public utility commission" in the state government pages of your telephone directory. You may also contact the FCC at the following address: Federal Communications Commission, Informal Complaints and Public Inquiries Branch, 2025 M St. NW Room 6202, Washington, D.C. 20554.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-28

In the Matter of

Amendment of Section 73.202(b), RM-7584
Table of Allotments,
FM Broadcast Stations.
(Abilene and Colorado City, Texas)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: February 11, 1991; Released: February 27, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Sure Broadcasting, Inc. ("petitioner"), licensee of Station KHXS(FM), Channel 292A, Abilene, Texas, requesting the substitution of Channel 292C2 for Channel 292A at Abilene and the modification of its license to specify the higher powered channel. To accommodate the allotment at Abilene, petitioner also requests the substitution of Channel 291A for Channel 292A at Colorado City, Texas, and the modification of Station KAUM(FM)'s license accordingly. Petitioner states that it will apply for Channel 292C2, if allotted to Abilene. Petitioner also states its willingness to reimburse the licensee of Station KAUM(FM) for the reasonable costs associated with the change in its operating channel.

2. We believe the public interest would be served by proposing the substitution of Channel 292C2 for Channel 292A at Abilene, Texas, since it could provide the community with a wide coverage area FM service. Channel 292C2 can be allotted to Abilene in compliance with the Commission's minimum distance separation requirements at petitioner's present transmitter site. Channel 291A can be allotted to Colorado City in compliance with the Commission's minimum distance separation requirements at the site of Station KAUM(FM).[1] As requested, we also propose to modify petitioner's license for Station KHXS(FM) to specify operation on the higher powered channel, and Station KAUM(FM)'s license to specify the alternate Class A channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Abilene or require the petitioner to demonstrate the availability of an additional equivalent class channel. Petitioner will be required to reimburse the licensee of Station KAUM(FM) for the reasonable costs incurred in moving to Channel 291A if this proposal is ultimately adopted. Finally, because Colorado City is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government in the allotment will be requested.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Abilene, Texas	223C2, 264C, 286C, 292A, 300C1	223C2, 264C, 286C, 292C2, 300C1
Colorado City, Texas	292A	291A

4. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, James G. Baum, licensee of Station KAUM(FM), Colorado City, Texas, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 291A as proposed herein instead the present Channel 292A.

5. Pursuant to Section 1.87 of the Commission's Rules, James G. Baum may, not later than **April 22, 1991,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on James G. Baum to furnish additional information. If James G. Baum raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, James G. Baum will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

6. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station KAUM(FM), as follows:

Mr. James G. Baum
Station KAUM(FM)
P.O. Box 990
Colorado City, Texas 79512

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **April 22, 1991,** and reply comments on or before **May 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Bruce A. Eisen
Kaye, Scholer, Fierman,
Hays & Handler
901 15th Street, N.W.
Washington, D.C. 20005
(Counsel for Petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 292C2 at Abilene are 32-28-34 and 99-42-22. The coordinates for Channel 291A at Colorado City are 32-23-15 and 100-53-33.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-484

In the Matter of

Amendment of Section 73.202(b), RM-7478
Table of Allotments,
FM Broadcast Stations.
(Kalispell, Montana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 11, 1991; Released: February 27, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6538 (1990), proposing the allotment of FM Channel 292A to Kalispell, Montana, as that community's fourth broadcast service, at the request of Skyline Broadcasters, Inc. (petitioner).[1] Neither petitioner nor any other party filed an expression of interest in the channel.

2. As stated in the Appendix to the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making a new allotment to a community absent an expression of interest. Therefore, since there has been no such interest here, we will dismiss the petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of Skyline Broadcasters, Inc., requesting the allotment of Channel 292A to Kalispell, Montana, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Petitioner is the licensee of AM Station KGEZ, Kalispell, Montana.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-29

In the Matter of

Amendment of Section 73.202(b), RM-7575
Table of Allotments,
FM Broadcast Stations.
(South Burlington, Vermont)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 11, 1991; Released: February 27, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Atlantic Ventures of Vermont L.P. ("petitioner"), licensee of Station WXXX(FM), Channel 237A, South Burlington, Vermont, requesting the substitution of Channel 238C3 for Channel 237A at South Burlington, and the modification of Station WXXX(FM)'s license to specify operation on the higher powered channel. Petitioner states that it will apply for Channel 238C3, if allotted to South Burlington.

2. We believe the public interest would be served by proposing the substitution of Channel 238C3 for Channel 237A at South Burlington, Vermont, since it could enable Station WXXX(FM) to expand its coverage area. Channel 238C3 can be allotted to South Burlington in compliance with the Commission's minimum distance separation requirements, with respect to all domestic allotments at the petitioner's desired site.[1] We are imposing a site restriction of 4.3 kilometers (2.6 miles) southwest to avoid prohibitive interference to Stations CBOC(FM), Channel 238A, Cornwall, Ontario, and CFLX(FM), Channel 238A, Sherbrook, Quebec, Canada. We note that use of the site restriction does not allow the allotment of Channel 238C3 at South Burlington to meet the required mileage separation to the two Canadian stations. However, we believe that it sufficiently protects the stations from prohibited interference. Canadian concurrence in the allotment is required since South Burlington is located within 320 kilometers (200 miles) of the U.S.-Canadian border. Therefore, we have sought Canadian concurrence in the allotment of Channel 238C3 at South Burlington as a specially negotiated allotment. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for use of Channel 238C3 at South Burlington or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
South Burlington, Vermont	237A	238C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 22, 1991,** and reply comments on or before **May 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lawrence Bernstein, Esq.
Brinig & Bernstein
1818 N Street, N.W.
Suite 200
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 238C3 are North Latitude 44-26-54 and West Longitude 73-13-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-30

In the Matter of

Amendment of Section 73.606(b), RM-7600
Table of Allotments,
TV Broadcast Stations.
(Vanderbilt, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 11, 1991; Released: February 27, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by GRK Productions, Inc. ("petitioner"), requesting the allotment of UHF Television Channel 45 to Vanderbilt, Michigan, as that community's first local commercial television service. Petitioner provides information in support of the proposal and states its intention to apply for the channel, if allotted.

2. Vanderbilt (population 525),[1] an incorporated town in Otsego County (population 14,993), is located in northern Michigan approximately 330 kilometers (205 miles) northwest of Detroit.

3. A staff engineering analysis of the proposal indicates that UHF Television Channel 45 can be allotted to Vanderbilt consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules without a site restriction.[2] However, the proposed allotment of Channel 45 to Vanderbilt will require a minus offset. [3] Since Vanderbilt is located within 250 miles of the U.S. - Canadian border, concurrence of the Canadian government will be obtained for this allotment. Although the Commission has imposed a freeze on new television allotments in certain metropolitan areas, Vanderbilt is not in one of the areas affected thereby.[4]

4. We believe the public interest would be served by proposing the allotment of Channel 45 to Vanderbilt, Michigan, since it would provide the community with its first local commercial television service. Accordingly, we seek comments on the proposed amendment to the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Vanderbilt, Michigan	---	45-

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **April 22, 1991,** and reply comments on or before **May 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary R. Knapp, President
GRK Productions, Inc.
7400 South 45 Road
Cadillac, Michigan 49601
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures are from the 1980 census.

[2] The coordinates for Channel 45 are 45-08-42 and 84-39-36.

[3] "A station with a 'plus' or 'minus' offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our *Rules." Crandon, Wisconsin,* 3 FCC Rcd 6765 n.1 (1988).

[4] *See Notice of Inquiry,* 2 FCC Rcd 5125 (1987), and *Order,* 52 FR 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-31

In the Matter of

Amendment of Section 73.202(b), RM-7535
Table of Allotments,
FM Broadcast Stations.
(Kershaw, South Carolina, and
Waxhaw, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 11, 1991; Released: February 27, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Jeffrey C. Sigmon ("petitioner") requesting the substitution of Channel 291C3 for Channel 291A at Kershaw, South Carolina, and the reallotment of Channel 291C3 from Kershaw to Waxhaw, North Carolina. In addition, petitioner requests the modification of his construction permit for Channel 291A at Kershaw (BPH-880324NK) to specify Waxhaw as the community of license. Petitioner states that he will apply for Channel 291C3, if allotted to Waxhaw.

2. Petitioner describes Waxhaw as an incorporated community in Union County, with its own telephone exchange, zip code, businesses, churches and schools. According to the 1980 U.S. Census, Waxhaw has a population of 1,208 persons. Waxhaw currently has no local aural transmission service. On the other hand, AM Station WKSC is licensed to Kershaw, and petitioner has received a construction permit for his FM station in the community. In addition, petitioner states that Kershaw receives service from ten radio stations licensed to nearby communities. Therefore, petitioner contends that the allotment of Channel 291C3 to Waxhaw would result in a preferential arrangement of allotments.

3. We believe the proposal warrants further consideration since it could provide Waxhaw with its first local FM transmission service. The proposal would not deprive Kershaw of its only aural transmission service. Furthermore, the allotment of Channel 291C3 at Waxhaw would be mutually exclusive with the present allotment of Channel 291A at Kershaw, since the communities are located approximately 26 kilometers (16.2 miles) apart while the Commission's Rules stipulate a minimum distance separation of 142 kilometers (88.2 miles) for co-channel Class A and C3 allotments. Channel 291C3 can be allotted to Waxhaw in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.1 kilometers (6.9 miles) southeast to avoid short-spacings to Station WRDX, Channel 293C, Salisbury, North Carolina, and the pending application of Station WZLI, Channel 291C1, Toccoa, Georgia (BPH-900301IE) as well as to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's construction permit for the new station at Kershaw to specify Waxhaw as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 291C3 at Waxhaw or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Waxhaw, North Carolina	--	291C3
Kershaw, South Carolina	291A	--

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **April 22, 1991,** and reply comments on or before **May 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Stephen T. Yelverton, Esq.
Maupin Taylor Ellis & Adams, P.A.
3201 Glenwood Avenue
Raleigh, North Carolina 27612-5008
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission

specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 291C3 at Waxhaw are North Latitude 34-51-38 and West Longitude 80-39-03.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-429

In re Applications of

EUGENE WALTON	File No. BPH-870904MS
NOR - DOT BROADCASTING, INC.	File No. BPH-870908MI
HENDERSON BROADCASTING OF MEMPHIS, INC.	File No. BPH-870908MJ
NOVELLA BROADCASTING COMPANY, L.P.	File No. BPH-870908MM
DAVID J. BOTT AND CARESE C. BOTT, JOINT TENANTS	File No. BPH-870908MN
AMERICAN INDIAN BROADCAST GROUP, INC.	File No. BPH-870908MQ
PEDERSON COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870908MS
GRACELAND BROADCASTING, INC.	File No. BPH-870908MT
OMNI BROADCASTING CORP.	File No. BPH-870908MV
GERMANTOWN BROADCASTING CORP.	File No. BPH-870908MY

For Construction Permit for a
New FM Station on Channel 298A
Germantown, Tennessee

Appearances

Cary S. Tepper on behalf of Eugene Walton; *Stanley G. Emert, Jr.* on behalf of Nor-Dot Broadcasting, Inc.; *Richard H. Waysdorf* on behalf of Henderson Broadcasting of Memphis; *William E. Kennard, Dean R. Brenner, Michael E. Beller* on behalf of Novella Broadcasting Company, L.P.; *Harry C. Martin* on behalf of David J. Bott & Carese C. Bott, Joint Tenants; *Robert Stone* on behalf of American Indian Broadcast, Inc.; *Stephen Diaz Gavin* on behalf of Pederson Communications Limited Partnership; *Howard W. Simcox, Jr.* on behalf of Graceland Broadcasting Corp.; *Harold K. McCombs* on behalf of Omni Broadcasting; *James R. Cooke* on behalf of Germantown Broadcasting Corp; and *Paulette Laden* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: February 20, 1991; Released: March 1, 1991

1. Of the seventeen applications for channel 298A in Germantown, Tennessee originally designated for hearing, ten applicants remain: Eugene Walton (Walton); Nor-Dot Broadcasting, Inc. (Nor-Dot); Henderson Broadcasting of Memphis, Inc. (Henderson); Novella Broadcasting Company, L.P. (Novella); David J. Bott & Carese C. Bott, Joint Tenants (Botts); American Indian Broadcast Group, Inc. (AIBI); Pederson Communications Limited Partnership (Pederson); Graceland Broadcasting, Inc. (Graceland); Omni Broadcasting Corp. (Omni); and Germantown Broadcasting Corp. (GBC).

2. The *Hearing Designation Order* specified the following issues:

> a) If a final environmental impact statement is issued with respect to GBC in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§1.1301-1319.
>
> b) To determine whether there is a reasonable possibility that the tower heights and locations proposed by the following applicants would constitute a hazard to air navigation: Crain, Omni, WMQM.
>
> c) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> d) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

The *Hearing Designation Order* specified that the comparative coverage of the different applications would be considered under the standard comparative issue.

3. By *Memorandum Opinion and Order*, FCC 89M-2029, released on August 4, 1989, the Presiding Judge added an issue to determine whether Walton's proposed transmitter site was short-spaced in violation of Section 73.207(b) of the Commission's Rules. In a subsequent *Memorandum Opinion and Order*, FCC 89M-2060, released on August 10, 1989, the issues in this proceeding were further en-

larged to include a misrepresentation/lack of candor issue with respect to AIBI's financial certification, and by *Order* FCC 89M-2478, released on October 18, 1989, the Presiding Judge ruled that the findings of fact and conclusions of law regarding that issue adopted in the San Angelo, Texas FM proceeding, MM Docket No. 88-552, would be incorporated by reference in this proceeding.

4. By *Order* FCC 89M-1974, released July 27, 1989, the Presiding Judge granted the Motion for Summary Decision filed by Omni Broadcasting Corp., and resolved Issue b in Omni's favor, and by *Order* FCC 89M-2479, released October 19, 1989, the Presiding Judge deleted the contingent environmental issue designated against GBC. The short spacing issue designated against Walton was resolved in his favor by *Order* released on November 3, 1989 (FCC 89M-2593). By an *Initial Decision* of Judge Chackin's (FCC 89D-51), released November 14, 1989, the misrepresentation/lack of candor issue was resolved in AIBI's favor. *See Order* released in this proceeding on September 6, 1990 (FCC 90M-2782).

5. A prehearing conference was held on December 2, 1988 and hearing sessions on November 7, 8, 9, 13, 14, 15, 16, 17, 20, 21, 27, 28, and 29, 1989. Proposed Findings of Fact and Conclusions of Law and replies thereto have been filed by all of the applicants. The Mass Media Bureau filed comments with respect to the comparative coverage issue.

EUGENE WALTON

FINDINGS OF FACT

Eugene Walton

6. Eugene Walton is a individual applicant and the sole proprietor of his application (Walton, Ex. #1).

Diversification

7. Mr. Walton does not have any ownership interest in any medium of mass communications (Walton, Ex. #2).

Best Practicable Service

8. Mr. Walton, a Black man, will serve a minimum of 40 hour a week as General Manager at Walton's proposed Germantown, Tennessee facility. As General Manager, Mr. Walton will establish station policy, and he will have ultimate responsibility for the supervision of all the station's staff (Walton, Ex. #3).

9. Mr. Walton has lived in Memphis, Tennessee since 1975. His current address is located within the 1 mV/m contour of his proposed station, and he will maintain this residence in the event that his Germantown, Tennessee application is granted (Walton, Ex. #3). Mr. Walton has been a member of the Boston Baptist Church, in Memphis, Tennessee for approximately 20 years, and as a part of his activities for his church, Mr. Walton has distributed food to the needy, has been involved in raising money for construction projects for the church as well as other church activities, and he has served on the church's revival committee. Mr. Walton has been the recipient of the following civic awards during the years indicated below.

1981: Outstanding Public Service Award from the Tennessee Lieutenant Governor's Staff.

1978: Congressional Community Service Award from United States Representative Harold Ford; and the City of Memphis Certificate of Appreciation for Public Service from Mayor Wyeth Chandler.

(Walton, Ex. #3, Tr. 58-63)

10. Mr. Walton worked at station KWAM, Memphis, Tennessee from 1951 to 1987. During that period of time, he was involved in sales, programming, news, public relations and other aspects of the station's operations. During the Fall of 1983, in addition to his duties at station KWAM, Mr. Walton worked as a part-time sales representative and announcer for radio station WXSS, Memphis, Tennessee (Walton, Ex. #3).

Auxiliary Power

11. Mr. Walton proposes to install and maintain an auxiliary power system which will permit the independent operation of the station and studio during a power outage or other emergency (Walton, Ex. #4).

CONCLUSIONS OF LAW

12. Mr. Walton is a sole proprietor. Although he is in his seventies, there is no evidence of record that he is not physically able to assume those duties which a General Manager of a broadcast facility traditionally performs (Tr. 84, 161). The record indicates that he has relied on Billy Bie for engineering services as well as for locating a suitable transmitter site, services for which Mr. Bie has been paid (Tr. 67, 68), and on Dean Osborne and Terry Scanlon for estimates on construction and equipment (Tr. 77). All three of these men provided assistance in completing the application. Mr. Walton, however, has himself played an active role in prosecuting the application. For example, he took the necessary steps to secure the financial commitment for the funds to build and operate the station (Tr. 79-80, 106, 110, and 113), Mr. Walton prepared the application form (Tr. 97), including the E.E.O. and programming statements (Tr. 133), (Tr. 116-117), and set up on his own the public inspection file (Tr. 118), contacted communications counsel, and then retained them (Tr. 114, 116).

13. Mr. Walton is an experienced broadcaster. Although he has relied on the paid services of Mr. Bie and has sought advice and help from friends, none of these individuals holds a present or future ownership interest in Walton. There is no evidence of record to contradict Mr. Walton's claim that these men have, at all times, acted at his direction, and that he has been in total control of the application process from the very beginning. The record demonstrates, rather that Mr. Walton prudently sought help from friends in completing those portions of the application process with which he was unfamiliar. Such actions do not evidence a lack of control but illustrate, rather, that Mr. Walton is a prudent man. The Presiding Judge concludes, therefore, that there is no indication in the record that Mr. Walton has not been or will not be in control of Walton, and that he is not ready and able to assume his integration commitment to the proposed station.

14. Mr. Walton, a Black American, has lived within the 1 mV/m contour of his proposed station for his entire life (Tr. 72-74). His civic activities within this area have been limited to work related to his church membership. Mr.

Walton is also an experienced broadcaster. Accordingly, the Presiding Judge concludes that Mr. Walton is entitled to a 100 percent quantitative integration credit, which is substantially enhanced by his African-American ancestry, his long-term residence within the 1 mV/m contour of his proposed station with some civic involvement and by his past broadcast experience.

NOR-DOT BROADCASTING, INC.

FINDINGS OF FACT

15. Nor-Dot is a Tennessee corporation which is owned in equal shares by Norma Daly and Dorthy Eisman. The corporation is governed by a Board of Director composed solely of Norma Daly (Nor-Dot, Ex. #1), who serves as President of Nor-Dot. At the time Nor-Dot's direct case exhibits were exchanged among the parties, Dorothy Eisman was also a director and an officer of Nor-Dot and she proposed full-time integration into the management of the station. However, Mrs. Eisman subsequently withdrew from active participation in Nor-Dot at the direction of her personal physician, and she no longer proposes to work at the station.

Diversification

16. Neither Nor-Dot, Mrs. Daly nor Mrs. Eisman has ownership interests in any medium of mass communications (Nor-Dot, Ex. #2, p. 4; Nor-Dot, Ex. #3, 2).

Best Practicable Service

Norma Daly

17. Mrs. Daly, a female, will serve as Station Manager at Nor-Dot's proposed station, working in excess of 40 hours a week. As Station Manager, Mrs. Daly will have the responsibility of overseeing the station's revenue generation (Nor-Dot, Ex. #2, p. 4).

18. Since 1984, Mrs. Daly has lived within the city grade contour of Nor-Dot's proposed station. During this period of time, she has been involved in the following civic and charitable activities within the proposed service area: the Fisherville Civic Club, 1969 to present, serving as Secretary/Treasurer; Al Chymia Shriner's Hospital for Burn Victims/Daughters of the Nile, 1971 to present; the Bellevue Baptist Church, 1954 to 1988; the Fisherville Baptist Church, 1988 to present; and the Cripple Children's Hospital, 1971 to present (Nor-Dot, Ex. #2, pp. 3-4).

19. Mrs. Daly was employed by station WHEY, in Millington, Tennessee from 1957 to 1961, as Program Director and as Bookkeeper/Office Manager (Nor-Dot, Ex. #2, p. 1).

Auxiliary Power

20. Nor-Dot will employ an auxiliary power system to prevent a disruption of service in the event of a power outage (Nor-Dot, Ex. #4).

CONCLUSIONS OF LAW

21. In light of Dorothy Eisman's post B cut-off date decision to withdraw her integration commitment, Nor-Dot, at the very most, is entitled to a 50 percent quantitative integration credit for its proposal to integrate Norma Daly on a full-time basis as Station Manager. The evidence of record, however, disputes even that claim. From the very start of the application process, Mrs. Daly relied exclusively on her late husband for the preparation and prosecution of her application (Tr. 187-88, 202, 204, 229, 340-41). Her participation in the process has amounted to little more than acceding to her husband's decisions with respect to the application. If Mr. Daly had lived, it is clear that he would have continued to be in complete control of the application process (Tr. 224), and, it is safe to conclude, of the broadcast facility as well. Mrs. Daly's disengagement from the entire process was and is too a large extent virtually complete (Tr. 192-93, 194-95, 203-04, 214, 222, 256-57, 262-63, 267, 273, 274-75, 341); to the extent that she indicated that she did not ever review the application prior to its filing (Tr. 192-93). What little involvement occurred began only after Mr. Daly's death (Tr. 229-30), and was then of a decidedly limited nature. Her integration commitment, therefore, can be given no weight in light of her past conduct, and Nor-Dot's claim of a 50 percent quantitative integration credit for Mrs. Daly is rejected. *See Utah TV Assn. Ltd.* 102 F.C.C. 2d, 1470, 1478-79.

22. In the event, however, that a determination is made upon appellate review that Mrs. Daly's integration proposal is entitled to a quantitative integration credit, it would be qualitatively enhanced by Mrs. Daly's residence within the city grade contour of Nor-Dot's proposed station, with slight civic involvement, and by her gender and to a very limited extent by her past broadcast experience.

HENDERSON BROADCASTING OF MEMPHIS, INC.

FINDINGS OF FACT

23. Henderson is a Tennessee corporation having two classes of stock, voting and non-voting (Henderson, Ex. #1, p. 1). All of the voting stock, representing a 20 percent ownership interest and profit share in the corporation, is held by Freddie Henderson, who also serves as President and Treasurer of the corporation (Henderson, Ex. #1, p. 1). Mr. Henderson's sister, Allie L. King, is Secretary of the corporation, and Mr. Henderson, Alan E. Glenn, and Leonard C. Dunavant, Jr., are the three members of the corporation's Board of Directors. Neither Ms. King, Mr. Glenn, nor Mr. Dunavant holds any interest in the corporation, nor do they hold any right to own or acquire any interest in the corporation in the future (Henderson, Ex. #1, p. 1; Tr. 547, 682). H. A. Gilliam, Jr. is the owner of all of the non-voting stock of Henderson representing an 80 percent ownership interest in the corporation. Mr. Gilliam is not an officer nor is he a director of the corporation (Henderson, Ex. #1, p. 1).

Diversification

24. Neither Henderson nor its sole voting stockholder, Freddie Henderson, holds, directly or indirectly, any ownership interest in any licensee or permittee of any television or radio station or any other medium of mass communications (Henderson, Ex. #2). Mr. Henderson

has been employed since December 1988 as the General Manager of radio station WLOK(AM), Memphis, Tennessee (Henderson, Ex. #2, p. 1). Mr. Henderson has made a timely pledge, in the event that the Henderson's application for Germantown is granted, to resign as General Manager of WLOK (AM) and otherwise sever all connections with that station, prior to the receipt of program test authority for the Germantown station (Henderson, Ex. #2, p. 1).

25. The non-voting shareholder, Mr. Gilliam, is an officer, director, and majority shareholder of Gilliam Communications, Inc., which is the licensee of station WLOK(AM), Memphis, Tennessee (Henderson, Ex. #2, p. 1).

26. Mr. Henderson and Mr. Gilliam both hold non-voting stock interests in Foster's Communications, Inc. (Foster's), an applicant for a new FM station at Olive Branch, Mississippi (Henderson, Ex. #2, p. 2). The Foster's FM application is still pending before this Commission. Mr. Henderson has promised unequivocally to divest himself of all interest in Foster's in the event that the Henderson application for the Germantown facility is granted (Tr. 701).

Best Practicable Service

27. Freddie Henderson, a Black male, proposes to serve as General Manager of Henderson's proposed station, devoting no less than forty (40) hours a week to his duties at the station (Henderson, Ex. #3, p. 1). Mr. Henderson will oversee the activities of all of the station's various departments as well as all aspects of the proposed station's operations (Henderson, Ex. #3, p. 1).

28. Mr. Henderson has resided, since 1961, at a number of residences in Memphis, Tennessee, all of which are located within the predicted 1 mV/m service contour of Henderson's proposed station (Henderson, Ex. #4). From 1984 through mid-1989, he served as a member of the Board of Directors of the Abe Schaff YMCA in Memphis, Tennessee. From 1978 to 1980, he served as the Treasurer of the Southwest Jaycees of Memphis, Tennessee, and since 1978, he has been responsible for publicity for special events at Mt. Moriah East Baptist Church in Memphis, Tennessee. Mr. Henderson also serves, since 1982, as a Special Deputy Sheriff, an honorary position to which he devotes approximately 10 hours annually. All of the above activities have taken place within the predicted 1 mV/m contour of Henderson's proposed Germantown station. He has also spent an average of three to five evenings a month serving as concert emcee, host or speaker for gospel singing performances, benefit concerts, and fund raising events sponsored by a number of different churches and charities in the Memphis area (Henderson, Ex. #4). Mr. Henderson was not paid for his services at these events which were not related to his employment at the radio station (Tr. 536-42, 557-59, 707).

29. Mr. Henderson began his career in broadcasting at radio station WLOK(AM) in Memphis, Tennessee in 1964. He held a number of positions with a broad range of responsibilities, at WLOK(AM) from 1964 until 1980 when he left that station to join radio station WDIA in Memphis, Tennessee, as an Account Executive & Local Advertising Sales Person, a position he held until August 1980 (Henderson, Ex. #4). Mr. Henderson returned to full-time employment at WLOK(AM) in September 1982, and divided his time for the next nine months between advertising, sales, and on-the-air announcing. In June 1983, Mr. Henderson again began working exclusively as an Account Executive at WLOK, and he held that position through May 1986 (Henderson, Ex. #4). Mr. Henderson was promoted again in May 1986 to the management position of Local Sales Manager of WLOK(AM). In this position, he supervised a local sales staff of six (6) employees (Henderson, Ex. #4). In June 1987, he was promoted to the position of General Sales Manager of WLOK(AM) and in December 1988, he was named General Manager of the station (Henderson, Ex. #4).

Auxiliary Power

30. Henderson will install auxiliary power generating equipment at its studio and transmitter locations to insure continued station operations in the event of a local power failure (Henderson, Ex. #5).

CONCLUSIONS OF LAW

Diversification

31. In light of the decision reached below that Mr. Gilliam has not been and will not be insulated from active participation in the applicant and in the proposed broadcast facility, Mr. Gilliam's majority ownership interest in Gilliam Communications, Inc., the licensee of station WLOK(AM), Memphis, Tennessee, is chargeable to Henderson under the diversification criterion.

Best Practicable Service

32. H. A. Gilliam, Jr., Henderson's non-voting shareholder, had intended, initially, to apply for the Germantown facility through Gilliam Communications, Inc. of which Mr. Gilliam is the majority shareholder (Tr. 433; 3037). However, on advice of counsel he decided not to do so, and instead encouraged Mr. Henderson, a long-time employee (Tr. 3034), to file for the license. Mr. Gilliam indicated to Mr. Henderson at the time that he would be interested in financing the project (Tr. 3044). Mr. Gilliam presented Mr. Henderson with an engineering report for the Germantown facility (Tr. 647), and he also supplied information with respect to potential transmitter sites (Tr. 647). Mr. Gilliam also suggested that Mr. Henderson retain his communications counsel (Tr. 455); however, this attorney advised Mr. Henderson to retain other counsel and Mr. Henderson subsequently retained an attorney recommended by Mr. Gilliam's attorney. Mr. Gilliam's engineer, the very same engineer that had prepared the original engineering report supplied to Mr. Henderson by Mr. Gilliam (Tr. 693-694), was hired by Mr. Henderson who did not contact any other engineer (Tr. 752). Mr. Gilliam, pursuant to his commitment to personally guarantee the construction and operating loan for Henderson, contacted the lending institution and arranged for Mr. Henderson to meet with the Senior Vice President of the bank, in order to obtain a loan commitment for the project (Tr. 467). Mr. Henderson did not contact any other banks or lending institutions (Tr. 467). Mr. Henderson did, however, prepare the budget for the station. He also met with the loan officer and provided him with the requested information, and he negotiated and obtained a suitable loan letter (Henderson, Ex. #4, p. 12; Tr. 469; 473-74, 675-76, 707-08). Mr. Henderson was unable to indicate why local counsel, Alan Glenn and Leonard Dunavant, were chosen to be members of Henderson's Board of Directors. Both, Mr. Henderson and

Mr. Gilliam deny that Mr. Gilliam recommended Messrs. Glenn or Dunavant to Mr. Henderson, and Mr. Gilliam denied knowing that the Messrs. Glenn and Dunavant were Directors of Henderson (Tr. 3135). Mr. Glenn, who is a partner of Mr. Dunavant, has performed legal services for Mr. Gilliam (Tr. 451, 718, 727-28, 3112-13, 3173).

33. Although Mr. Gilliam denied that he attended the Henderson organizational meeting held on November 17, 1987, at which meeting stock certificates were issued (Tr. 3115), or that he ever met with Messrs. Glenn and Henderson concerning the Henderson application (Tr. 3117), minutes of Henderson's first and second meetings of incorporation on the above referenced date indicate that Mr. Gilliam was present at Mr. Glenn's office on November 17, 1987 for this meeting (Novella, Ex. #6, 7, 8). Henderson explains the discrepancy by stating that the minutes were prepared prior to the meeting and are in error in that respect (Tr. 495, 656, 736-37, 3115, 3131); and that Mr. Gilliam was not in attendance, whereas Allie King was, although she is not listed as attending the meeting (Tr. 656). No explanation was given why the minutes were prepared ahead of time or why they were not corrected to reflect who was and who was not in attendance.

34. Not only did Mr. Gilliam play a role in arranging for the financing for the Henderson's proposed station, he is also, at the very least, responsible for 80 percent of the costs of prosecuting the application. In addition, Mr. Gilliam has agreed to guarantee the construction and operating loan from the financial institution (Walton, Ex. #7). It is evident, therefore, that Mr. Gilliam has a significant stake in the enterprise; a project which he initially wanted to pursue on behalf of his own communications company. He decided not to do so, but chose instead to assume, on the advice of counsel, the role of a non-voting shareholder, in what was originally a single stock corporation but was subsequently amended to reflect a two-tier corporation with Mr. Henderson, the sole voting shareholder, and Mr. Gilliam, the non-voting shareholder. Mr. Gilliam also agreed, pursuant to the shareholder's agreement executed by both principals on November 17, 1987, to be bound by the restrictions against active participation by the non-voting shareholder in the affairs of the corporation as set forth in his corporation's By-Laws (Henderson, Ex. #8). Nevertheless, Mr. Gilliam testified that if he felt that Mr. Henderson had chosen the wrong format for the station, he would tell him so (Tr. 3168), but added that he has no idea whether or not Mr. Henderson would heed his advice (Tr. 3168).

35. Mr. Gilliam testified that he views the project as a good investment, adding that he feels bound to the terms of the agreement and is totally committed to the project (Tr. 3099-3100, 3126, 3182). His dedication to the project, clearly, cannot be questioned. It was, after all, initially his own idea. He was dissuaded from pursuing the project on the advice of communications counsel who believed that it would jeopardize his application for a Germantown television facility then pending before this Commission. Although Mr. Gilliam's financial stake in this project is considerable, both he and Mr. Henderson deny any involvement by Mr. Gilliam in financial matters affecting the station. Mr. Henderson did mentioned, however, that he discusses finances with Mr. Gilliam all the time, but later clarified that remark by stating that he only tells Mr. Gilliam about expenses once a month (Tr. 477). He indicated that he does not provide invoices to Mr. Gilliam, does not seek his permission or approval to pay bills, and does not provide Mr. Gilliam with any detailed accounting (Tr. 505, 3067, 3086, 3145-46). According to Mr. Henderson, his calls to Mr. Gilliam are simply requests for his pro-rata share of the expenses (Tr. 480-81, 484, 677, 3067, 3131, 3145).

36. The Presiding Judge finds Mr. Gilliam and Mr. Henderson's testimonies not believable. Mr. Gilliam's role as a non-voting shareholder in this enterprise was forced on him. It was not what he initially intended. It was only after being advised by counsel that his active pursuit of a license for the FM station in Germantown would compromise another application pending before this Commission, that he decided to recruit a long time employee to join the project as, ostensibly, the sole active principal. He, however, remained financially liable for a significant percentage of the costs of prosecuting the application and agreed to personally guarantee the loan for the construction and operation of the station. Although Henderson insists that the record is devoid of any evidence of Mr. Gilliam's active participation in the enterprise after the filing of the application, Mr. Gilliam remains Mr. Henderson's boss, as well as the source and guarantor of the necessary funds for the project. He is an experienced and active broadcaster who can be expected to have opinions not only as to the proper format for the station but also with respect to the proper management of the station and its policy. It is simply not credible that someone of Mr. Gilliam's background in broadcasting, strong interest in the project as well as his significant financial commitment to the process and equity interest in the applicant would remain purely passive during the application process or once the proposed station is operational, remain on the side lines; to date the evidence of record indicates that he hasn't, since virtually all significant decisions were made by him at the very beginning of the process with Mr. Henderson following the path already paved by Mr. Gilliam. The evidence of record, therefore, viewed as a whole, warrants the conclusion that Mr. Gilliam is, and has not been a purely passive investor, and that his equity interest of 80 percent must be considered in determining the amount of quantitative integration credit due Henderson for its proposal to intergrate Mr. Henderson into the management of the proposed station.

37. As noted above, Mr. Henderson proposes to be integrated into the affairs of the proposed station on a full-time basis as General Manager. There is nothing in the record to dispute either his commitment or his ability to meet that pledge. The Presiding Judge concludes, therefore, that Henderson is entitled to a quantitative integration credit of 20 percent, which is qualitatively enhanced by the fact that Mr. Henderson is Black, has lived within the 1 mV/m service contour of Henderson's proposed station since 1961 with a moderate degree of civic involvement and is further enhanced, to a slight extent, by his past broadcast experience.

NOVELLA BROADCASTING COMPANY, L.P.

FINDINGS OF FACT

38. Novella is a Tennessee limited partnership. Its sole general partner, Novella D. Smith, owns a 25% equity interest, and its limited partner, the A.H.A.B. Family

Trust, holds a 75% limited partner interest (Novella, Ex. #1, p. 1). Until May 31, 1988, Novella's 75% limited partner was Mediacom National, Inc. (Mediacom), a corporation wholly-owned by Regan A. Henry.

Diversification

39. Neither Novella Broadcasting nor Novella's general partner, Ms. Smith, holds any attributable interest in a medium of mass communications (Novella, Ex. #2, p. 1). Novella's limited partner, the A.H.A.B. Family Trust, does not presently have any attributable media interests (Walton, Ex. #35, at Exhibit A). Regan Henry, President and 100 percent shareholder of Novella's initial limited partner Mediacom, and the creator and source of funds for the present limited partner, as well as members of his immediate family have considerable ownership interests in broadcast facilities throughout the country (Walton, Ex. #22).

Best Practicable Service

Novella D. Smith

40. Novella Smith, a Black woman, is the sole general partner of Novella. She proposes to work at the station on a full-time basis at least forty (40) hours a week as General Manager (Novella, Ex. #3, p. 1). In that capacity she will have ultimate responsibility for all management, administrative, budgetary, and programming decisions relating to the operation of the station (Novella, Ex. #3, p. 1). In the event that Novella is awarded the construction permit, Ms. Smith will resign from any other employment she might hold at the time to assume her duties at the station (Novella, Ex. #3, 1).

41. Ms. Smith, a resident of Memphis, Tennessee, lived within the city limits of Germantown, Tennessee from 1973 to 1980 (Novella, Ex. #3, p. 1), and has lived within the proposed service area of Novella's proposed station for a total of 15 years. In the event that Novella is awarded the construction permit, Ms. Smith will move back to Germantown, Tennessee (Novella, Ex. #3, p. 1). Ms. Smith has served on the Advisory Board of the Memphis Area Vo-Tech since 1983, and has been a volunteer jail chaplain since 1984. She has also been a member of the Shelby County Beer Board since 1983, and has been its Chairperson since 1988. The position with the Board is by appointment of the Shelby County Mayor and is unpaid. Since 1982, Ms. Smith has been a member of NETWORK, a professional and executive woman's organization and she served as its Chairperson from 1984 to 1987. She is also a co-founder and member since 1980 of the Homeless Ministry, and she has been an active member of the Memphis, Tennessee NAACP Chapter since 1973. From 1983 to 1988, Ms. Smith served on the Minority Affairs Committee of St. Mary's Episcopal School, and from 1982 to 1986 on the Board of Directors of Playhouse on the Square (Novella, Ex. #3, pp. 3-4).

42. Ms. Smith's career in broadcasting began in 1959 as a full-time announcer for a radio station in Houston, Texas (Novella, Ex. #3, p. 2). She subsequently served as a part-time consultant to James Brown Broadcasting (Novella, Ex. #3, p. 2). Concurrent with her part-time consultant's position, Ms. Smith worked full-time, including an announcer's shift, at KPRC(AM), Houston, Texas, from 1966 to 1969 (Novella, Ex. #3, p. 2). From December 1984 to January 1987, Ms. Smith was employed full-time at station WHBQ-AM, Memphis, Tennessee as an announcer, account executive, and salesperson (Tr. 1370-73; Novella, Ex. #3, p. 3).

Auxiliary Power

43. Novella proposes to install an auxiliary power source at both its proposed studio and transmitter sites (Novella, Ex. #4).

CONCLUSIONS OF LAW

Diversification

44. Novella and Ms. Smith have no media interests. As noted above, Mr. Henry has extensive interests in broadcasting. In view of the decision reached below that Mr. Henry is not properly insulated, his media interests are chargeable to Novella. Novella is, therefore, subject to a diversification demerit.

Best Practicable Service

45. Novella claims a 100 percent quantitative integration credit on the basis of its proposal to integrate its sole general partner into the management of its proposed Germantown station. The claim is premised on the argument that Ms. Smith, the general partner, has been in complete control of the enterprise, and that the limited partner is truly a passive principal. The evidence of record, however, shows an amazing degree of disengagement on Ms. Smith's part from virtually the entire application process which belies her claim that she was and is in total control of the applicant.

46. For example, Ms. Smith testified that she was never advised who the owners of the original limited partner, Mediacom, were (Tr. 866-868, 1070), and she did not know that Regan Henry owned 100 percent of Mediacom (Tr. 3607). As to the new limited partner, the A.H.A.B. Family Trust, Ms. Smith did not know whether Mr. Henry controls the trust or even if he contributes money to the trust (Tr. 1397). She never received and, presumably, did not ask for a copy of the trust agreement, and she did not ask Mr. Henry what effect, if any, the substitution of the A.H.A.B. Family Trust for Mediacom would have on their existing general partner/limited partner relationship (Tr. 3637-3639). Mr. Henry, for his part, did not send Ms. Smith any information concerning the financial wherewithal of the A.H.A.B. Family Trust and he did not instruct anyone else to send such information (Tr. 3639).

47. Novella explains Ms. Smith's lack of interest in Mediacom and the A.H.A.B. Family Trust by stating that Ms. Smith then and now looks to Mr. Henry for the necessary funds to prosecute the application and to build the station and operate it for three months without revenues (Walton, Ex. #10A; Tr. 3652). However, Mr. Henry did not show Ms. Smith his personal financial statement (Tr. 3619-22), and no one else has provided her with such information (Tr. 3620). Mr. Henry did send his financial statement to Mr. Honig, Novella's communications counsel (Tr. 3622; Walton, Ex. #9), but testified that he would not have sent Ms. Smith any personal financial information since he does not consider such matters any of Ms. Smith's business (Tr. 3624). As to Novella's back up financing with CVC Capital Corporation (CVC) (Tr. 1103, 1356), Ms. Smith demonstrated a similar lack of knowledge about or interest in the institu-

tion. For example, she was unable to say what type of entity CVC is (Tr. 1152), and testified, simply, that she received the letter from CVC and signed it (Tr. 1358).

48. Ms. Smith also failed to inform herself as to the source of the assets of the new limited partner, the A.H.A.B. Family Trust, or the general wherewithal of the trust fund (Tr. 1075-76). In fact, Ms. Smith just recently learned for the first time from counsel for Novella that Regan Henry contributes to the A.H.A.B. Family Trust (Tr. 1221-1223).

49. Mr. Honig has had a long-lasting relationship with Regan Henry. He personally selected a number of individuals whose applications for broadcast facilities Mr. Henry agreed to fund (Tr. 3700-3701). Once selected, the person was introduced to Mr. Henry (Tr. 3695). In this instance, the initial contact between Mr. Honig and Ms. Smith was arranged by another person, Pleuria Marshall. Mr. Honig then introduced Ms. Smith to Mr. Henry (Tr. 3694). Mr. Henry suggested a limited partnership format for Novella (Tr. 1169), and discussed programming with Ms. Smith (Tr. 1168). The form for the limited partnership agreement which Mr. Henry showed Ms. Smith came from Mr. Henry's files. Although Novella contends that Mr. Henry and Ms. Smith's local counsel worked together on the terms of the partnership agreement, Ms. Smith could not point to any specific terms, or revisions in the language of the agreement which she could attribute to her local counsel (Tr. 1034). The final Novella partnership agreement was printed out in Mr. Henry's law office on September 3, 1987 (Tr. 1029, 3582) with certain specific changes in the form agreement, which, Novella argues, resulted from discussions between Ms. Smith, her local counsel, Mr. Honig, and Mr. Henry (Tr. 3589, 3678). However, when shown the limited partnership agreement for Sanders Broadcasting Company, L.P. (Walton, Ex. #12), an F.C.C. applicant limited partnership formed prior to Novella Broadcasting, Mr. Henry agreed that the Novella and the Sanders limited partnership agreements were virtually identical, and both agreements included those specific provisions which he had previously indicated were the result of negotiations with Ms. Smith (Tr. 3590-1). Similarly, Ms. Smith testified that limited partnership agreements for subsequently filed applications, also sponsored by Mr. Henry, Best Broadcasting Company, L.P. (Walton, Ex. #13), Crimiel Communications Associates, L.P. (Walton, Ex. #18) and Port City Communications (Port City) (Graceland, Ex. #4), are substantially identical to Novella's partnership agreement (Tr. 1040-1044, 1111-1113, 1404-1406).

50. Ms. Smith testified that she and Mr. Honig prepared the programming statement for Novella's application (Tr. 997), indicating that she drafted the statement in her own words and then asked Mr. Honig to look it over (Tr. 998, 1118). After being shown a copy of the programming statement tendered as part of the Port City Communications application, referenced above, Ms. Smith agreed that the Port City programming statement is substantially identical to that submitted as part of her application (Walton, Ex. #19; Tr. 1119-1123). Ms. Smith continued, nevertheless, to insist that the statement was drafted by her and that she was not shown any other application to use as a model (Tr. 1123-24). Ms. Smith was then shown portions of the application filed by Owens Broadcasting, Ltd. (Owens) with the F.C.C. on September 14, 1989 for a new FM station to serve Jupiter, Florida, with Mr. Honig's name listed as the contact person (Walton, Ex. #20). Ms. Smith agreed that her statement and the Owens' statement had identical formats, identical type, and four of the five paragraphs in the Owens' statement were identical word for word to those in Novella's statement (Tr. 1126-7).

51. As noted above, Ms. Smith was kept completely in the dark with respect to Mr. Henry's finances. When the A.H.A.B. Family Trust was substituted for the original limited partner, Mediacom, Ms. Smith was not told that the Trust was involved with a number of other pending applications before the Commission for broadcast licenses or the extent of the Trust's participation in these applications (Tr. 1100-1101). In fact, she was not even informed of the assignment of Mediacom's limited partnership interest to A.H.A.B. Family Trust until after it had already occurred. Mr. Henry, however, had been talking to Mr. Honig about these matters all along (Tr. 3629-31), and it was Mr. Honig, a long-time associate of Mr. Henry's, who made the first contact with CVC which, according to Ms. Smith, is providing back up financing. Ms. Smith has never talked to anyone at CVC and as noted previously, was unaware of the nature of the entity. CVC did, however, contact Mr. Henry to inquire about Ms. Smith (Tr. 3713-3715).

52. The evidence of record viewed in its entirety demonstrates a degree of passivity, almost amounting to disinterest, on Ms. Smith's part which belies her claim that she is in total control of the enterprise. Mr. Honig, although ostensibly Novella's counsel, has from the very start been acting, for all intents and purposes, as Mr. Henry's representative. Mr. Henry, in turn, through Mr. Honig, has been in control from the very beginning of the enterprise, involving Ms. Smith only to the extent necessary to create the appearance that she was in control. Her lack of knowledge, indeed curiousity, with respect to the nature of her new limited partner is particularly telling, since it is and has been the primary source of funds for prosecuting Novella's application. Therefore, the Presiding Judge concludes that Novella's limited partner through its unofficial agent, Mr. Honig, has been an active participant in promoting the Novella application; to a degree that Ms. Smith appears to have been the more passive partner. Accordingly, the limited partner's equity interest in the applicant must be considered in determining the amount of quantitative integration credit to award Novella for its proposal to integrate Ms. Smith, on a full-time basis, into the affairs of its proposed station.

53. Any quantitative integration credit awarded Novella for Ms. Smith integration commitment would be qualitatively enhanced by her status as a member of a recognized minority group, her gender, her long-term residence within the proposed service area of the station and for a period of time in Germantown, Tennessee, with some civic involvement, and her decision to move back to Germantown, Tennessee in the event that Novella is the successful applicant. Ms. Smith also has some broadcast experience which is of very minor significance.

DAVID J. BOTT AND CARESE C. BOTT, JOINT TENANTS

FINDINGS OF FACT

54. If their application is granted, David J. and Carese Bott have agreed to a joint tenancy ownership of their proposed Germantown, Tennessee radio station (Botts, Ex. #1).

Diversification

55. Mr. Bott presently serves as General Manager at station WCRV(AM), Collierville, Tennessee. In the event that the Botts' Germantown, Tennessee application is granted, he will sever all connections with the station. Similarly, Mrs. Bott, who serves as Director of Community Service for the same station will also resign from her position at that station and otherwise sever all connections with WCRV if Botts is the successful applicant. Mr. and Mrs. Bott have no other interests in or associations with any medium of mass communications (Botts, Ex. #2, and Botts, Ex. #3,).

Best Practicable Service

David J. Bott

56. David J. Bott will serve on a full-time basis, forty (40) or more hours a week, as General Manager of the proposed station. In this capacity, he will be in charge of all of the station's operations, including programming, sales, finances, and its technical operations (Botts, Ex. #2, 1).

57. Mr. Bott moved to a residence within the 3.16 mV/m contour of the Botts' proposed station in December 1986, and in November 1987, he moved to Germantown, Tennessee. Mr. Bott has been involved since 1987 with Memphians for Life, serving as a member of the Executive Board, the Tennessee Home Education Association, the Germantown Chamber of Commerce and the First Evangelical Church. He has also, since 1988, been Chairman of the Publicity Committee for Teen Challenge, serving as a member of its Board of Directors since July 1989 (Botts, Ex. #2).

58. Since December 1986, Mr. Bott has been General Manager of WCRV(AM), Collierville, Tennessee and Vice-President and a Director of its licensee Bott Broadcasting of Tennessee (Botts, Ex. #2, p. 2). Prior to that, he was employed as a full-time Account Executive with a radio station in Seattle, Washington and on a part-time basis as an announcer/board operator with a radio station in Independence, Missouri (Botts, Ex. #2, pp. 2-3).

Carese C. Bott

59. Mrs. Bott will serve on a full-time basis, at least forty (40) hours a week, as Community and Public Affairs Director of the proposed station. She will be in regular contact with the major interest groups in Germantown, Tennessee and the surrounding area, and she will produce a regular series of public affairs programming directed to community problems. In addition to working with Mr. Bott in developing overall station policy and ensuring that it is implemented on a day-to-day basis, Mrs. Bott will perform various business management functions (Botts, Ex. #3, p. 1; Tr. 1708, 1716-19).

60. Mrs. Bott has lived in the Germantown, Tennessee area most of her life. From August 1964 until April 1973, she resided within the 1 mV/m contour of the proposed station, and from April 1973 until August 1980, she resided within the 3.16 mV/m contour of the Botts' proposed station. She returned to the Germantown area in December 1986 and lived within the 3.16 mV/m contour until November 1987 when she and Mr. Bott moved to Germantown, Tennessee where she presently resides (Botts, Ex. #3, p. 1). Mrs. Bott has participated in a number of civic activities within the 1 mV/m contour of the proposed Germantown station. Since January 1987, Mrs. Bott has been a member of F.L.A.R.E., a woman's group concern with public morality, serving as that organization's Vice-President since the Spring of 1988 (Tr. 1640). She is also a member of the Adolescent Pregnancy Task Force of the Community Foundation of Greater Memphis and has served on the Employment Training Committee of this task force since 1988. Mrs. Bott has also been an Executive Board Member of Memphians for Life since early 1987 (Tr. 1640), as well as an Administrator of the pre-school children's program for the First Evangelical Church, Memphis, Tennessee since the Spring of 1988 (Tr. 1551, 1640). In June 1988, she was appointed Senior-President of the Germantown, Tennessee chapter of the Children of the American Revolution (Tr. 1640, 1689-90, 1551-52), and she has been a member of the Daughters of the American Revolution, in Germantown, Tennessee since the Spring of 1987 (Tr. 1640). Mrs. Bott has been a docent for the Mallory-Neely House in Memphis, Tennessee since April 1987 (Botts, Ex. #3, p. 2).

61. Mrs. Bott has been employed at station WCRV(AM), Collierville, Tennessee since December 1986. She served as full-time Business Manager and Director of Community Service from December 1986, until February 1988. Included among her responsibilities was maintaining regular contacts with representatives of all major interest groups in the Memphis, Tennessee metropolitan area and producing a public affairs program for the station. Mrs. Bott continues to serve as WCRV's Director of Community Service although she has reduced her employment to a non-salaried, part-time position requiring approximately 15 hours per week. From January 27, 1986, until December 1986, Mrs. Bott was employed on a full-time basis by radio station KGNW, Seattle, Washington as the receptionist and sales secretary. On August 1, 1986, Mrs. Bott was promoted to Business Manager and served as the General Manager's executive secretary. She also produced commercials for the station (Botts, Ex. #3, p. 3).

Auxiliary Power

62. The Botts will install auxiliary power equipment at their Germantown station (Botts, Ex. #4).

CONCLUSIONS OF LAW

Diversification

63. The Botts have no chargeable media interests or associations.

Best Practicable Service

64. The Botts claim a 100 percent quantitative integration credit on the basis of their claim that they will both be integrated on a full-time basis into the affairs of the

station in management level positions. Mr. Bott proposes to serve as General Manager and Mrs. Bott as Community and Public Affairs Director. Mrs. Bott indicated that there is only a possibility that she will supervise a staff as Community and Public Affairs Director of the Germantown, Tennessee station (Botts, Ex. #3, p. 1; Tr. 1678). At the hearing, although no reference was made to such a role in the Botts' integration statement, in their answers to interrogatories or in their written case exhibits, Mrs. Bott testified that she will also serve as Business Manager at the proposed station as well as perform other duties not previously disclosed. These additional duties, as described by Mrs. Bott, fall within the recognized scope of the position of Business Manager and are not considered to be among the duties of a Community and Public Affairs Director (Tr. 1727).

65. In addition to their projected duties at the Germantown, Tennessee facility, the Botts have also committed themselves to supervise, both on site and over the telephone, the construction and operation of a station at Mt. Juliet, Tennessee, if their application for that facility is granted. According to Mrs. Bott, her father, Dr. Hugh A. Clarke, agreed to loan the money for the Mt. Juliet station with the understanding that both she and her husband would also be involved in the management of that station. Mr. Bott made it clear during the course of his testimony that both he and his wife intend to continue to prosecute the Mt. Juliet application, and that it was certainly not his intention to file superfluous applications (Tr. 1667-68, 1790-91). However, he was uncertain as to whether or not they would keep both the Mt. Juliet and the Germantown stations if both channels were awarded to them (Tr. 1790-91). If denied the Germantown application, however, he indicated that he might manage the Mt. Juliet, Tennessee station although they do not propose to be integrated into the management of that station at this time (Tr. 1791).

66. In light of the Botts' commitment to the Mt. Juliet, Tennessee application, vague though it may be, it is impossible to credit them with the 100 percent quantitative integration commitment claimed here. The Botts failed to explain how they could meet their full-time commitments to the Germantown facility and still honor their commitment to Mrs. Botts' father to be actively involved in the Mt. Juliet facility. In order to award either Bott a quantitative integration credit of any degree in this proceeding, the Presiding Judge would have to ignore their joint commitment to the Mt. Juliet, Tennessee station and to guess as to the extent to which those commitments would impair or render unrealistic their full-time integration commitments to the Germantown, Tennessee facility. The fact that they intend to hire a manager and staff to operate the Mt. Juliet station does not discount their promise to be personally involved in the affairs of that facility (Tr. 1791-92). Accordingly, the Presiding Judge concludes that it is impossible, on the basis of the present record, to reconcile these two commitments and to reach a decision as to the number of hours that either individual can realistically commit to the Germantown, Tennessee facility.

67. Even if we were to find that Mr. Bott was entitled to a credit for his proposal to be integrated on a full-time basis in a management position at the station, Mrs. Bott's proposal would not be entitled to any credit even if we disregard, for the purposes of this discussion, her commitment to the Mt. Juliet station. The record does not disclose that Mrs. Bott, as Community Affairs Director, will have any managerial responsibilities; she was unsure, for example, whether or not in that capacity she would have a supervisory role at the station. Her testimony at the hearing that she will also serve as Business Manager, a position with managerial responsibility, was clearly an attempt to upgrade her comparative posture, impermissibly, and cannot be taken into consideration in determining the nature of the role Mrs. Bott will assume at the station. It does not appear, therefore, that Mrs. Bott will spend the required minimum of 20 hours a week on duties at the station which are managerial in nature.

68. In the event, however, that it is determined at a later stage in this proceeding that the Botts' application is entitled to quantitative integration credit, any credit awarded for Mr. Bott's proposal would be qualitatively enhanced by his residence for two years within the community of license and his one year residence within the city grade contour with some civic involvement and further, by his past broadcast experience. Any credit awarded for Mrs. Bott's integration proposal would be qualitatively enhanced by her residence between 1978 and 1980 within the service area of Botts' proposed station and her additional two years residence in Germantown, Tennessee with some civic involvement, her gender and to a minor extent by her past broadcast experience.

AMERICAN INDIAN BROADCAST CORPORATION, INC.

FINDINGS OF FACT

69. American Indian Broadcast Corporation (AIBC) is a Tennessee corporation, which is authorized to issue 1,000 shares of common stock. AIBC's principals are: Jack W. Bursack who is President/Director and 51 percent shareholder; and Lynwood H. Eaton who is Secretary/Treasurer/Director and 49 percent shareholder (AIBC, Ex. #1).

Diversification

70. Jack W. Bursack is President, Director and 98.6 percent shareholder of Smyrna Broadcasting Corporation, the licensee of an AM broadcast station WSVT, in Smyrna, Tennessee. Mr. Bursack also serves as General Manager of the station (AIBC, Ex. #2).

71. Lynwood H. Eaton, is the licensee of AM broadcast station WCOR, Lebanon, Tennessee (AIBC, Ex. #2).

72. AIBC is the licensee of station KPOS, Post, Texas, permittee for station KFXJ, Abilene, Texas (see *Order* FCC 90M-2784 released in this proceeding on September 6, 1990) and the permittee for a new FM broadcast station to serve the community of San Angelo, Texas (see *Order* FCC 90M-2782 released in this proceeding on September 6, 1990). It is also a 49 percent general partner in Boles-American Indian, a General Partnership, the permittee for a new FM broadcast station which will serve the community of Post, Texas on 107.3 megahertz (AIBC, Ex. #2).

Best Practicable Service

73. AIBC does not seek credit for the integration of ownership into management of the proposed Germantown, Tennessee broadcast facility.

Auxiliary Service

74. AIBC does not propose to install an auxiliary power supply source.

CONCLUSIONS OF LAW

Diversification

75. Neither AIBC nor its principals proposes to divest any of their media interests in the event that AIBC is awarded the construction permit. As noted above, Mr. Bursack holds a 98.6 percent ownership interest in the licensee of an AM broadcast station in Smyrna, Tennessee and he also serves as General Manager of that station. Mr. Eaton, another AIBC principal, is the licensee of standard AM broadcast station WCOR, Lebanon, Tennessee. AIBC, itself, is the licensee of standard AM broadcast station KPOS, Post, Texas, and a 49 percent General Partner in the permittee of a new FM broadcast station to serve the same community. It is also the permittee for a new FM station in San Angelo, Texas and a broadcast facility in Abilene, Texas. The AIBC application, on the basis of these existing media interests, is subject to a diversification demerit.

Best Practicable Service

76. AIBC does not propose any integration of ownership into management nor does it propose to install an auxiliary power source. It is not, therefore, entitled to a preference of any degree under this criterion.

PEDERSON COMMUNICATIONS LIMITED PARTNERSHIP

FINDINGS OF FACT

77. Pederson is a State of Tennessee limited partnership (Pederson, Ex. #1).

78. Paula M. Pederson is the general partner of Pederson. Ms. Pederson owns 20 percent of the total partnership interests in Pederson. B. Scott Reardon III is the limited partner of Pederson, and he owns 80 percent of the total partnership (Pederson, Ex. #1).

Diversification

79. Pederson and its general partner, Ms. Pederson, do not have any interests in any medium of mass communications (Pederson, Ex. #2, p. 1). However, Ms. Pederson is President and 100 percent shareholder of Pederson and Associates, Inc. d/b/a the Singles Register (Pederson, Ex. #2, p. 1). The Singles Register publishes *Singles Today*, a magazine with approximately 1,000 total subscribers, with approximately 25 located in Germantown, Tennessee area (Pederson, Ex. #2, p. 1; Tr. 2102). Ms. Pederson previously committed herself to terminate her employment with The Singles Register, see Pederson's Integration and Diversification Statement. On July 15, 1989, Ms. Pederson hired an assistant who will assume the full range of duties at The Singles Register if and when Pederson receives the construction permit for the new Germantown radio station (Pederson, Ex. #2, p. 1; Tr. 2168-69). Ms. Pederson, however, will retain her ownership interest in The Singles Register (Pederson, Ex. #2, p. 2), but she will have no day-to-day responsibilities for the management of The Singles Register or any of its subsidiaries (Pederson, Ex. #2, p. 2; Tr. 2168).

80. B. Scott Reardon does not presently have any ownership interest in any radio, television or other broadcast station, or in any other medium of mass communications (Pederson, Ex. #2, p. 2). At the time of the filing of the Pederson application, Mr. Reardon had a 50 percent ownership interest in Sedgwick Broadcasting Co., the licensee of radio station KXLK(FM), Haysville, Kansas (Pederson, Ex. #2, p. 2). Although Mr. Reardon did not make a timely commitment to divest his interest, he sold his 50 percent interest in Sedgwick to his partner in April 1988 (Pederson, Ex. #2, p. 2).

Best Practicable Service

Paula M. Pederson

81. Ms. Pederson will be integrated on a full-time basis, or a minimum of forty (40) hours a week, as General Manager of the proposed station (Pederson, Ex. #3, p. 1). As General Manager, Ms. Pederson states that she will have primary and the ultimate responsibility for all decisions affecting the station's day-to-day and long range operations (Pederson, Ex. #3, p. 1).

82. Ms. Pederson has lived in Germantown, Tennessee since June 1982 except for a period of time between March 1987 and March 1988 when she lived in Cordova, Tennessee which abuts Germantown and lies within the 3.16 mV/m contour of Pederson's proposed station (Pederson, Ex. #3, p. 3). Ms. Pederson served on the Germantown, Tennessee Cablevision Advisory Board from January 1983 to December 1984 (Pederson, Ex. #4, p. 4; Tr. 2101) and was a member and Vice-President of the Dogwood Trails Homeowner's Association from 1982 to 1984 (Pederson, Ex. #4, p. 6). She was also an active member and volunteer of the Farmington School Parent Teacher Association from 1982 to 1988 (Pederson, Ex. #4, p. 6; Tr. 2113), and a member of the Germantown Red Devils Soccer Booster Club for 2 years (Pederson, Ex. #4, p. 6; Tr. 2113).

83. Ms. Pederson has no broadcast experience (Tr. 2096).

Auxiliary Power

84. Pederson will install an auxiliary power supply system at both its transmitter and studio locations (Pederson, Ex. #5).

CONCLUSIONS OF LAW

Diversification

85. Mr. Reardon is found below not to be an insulated principal. Accordingly, his media interest in the FM radio station in Haysville, Kansas is chargeable to Pederson under the diversification criterion, and Pederson is subject to a diversification demerit.

Best Practicable Service

86. Mr. Reardon, who is the principal source of funds required for prosecuting the Pederson application, approached Ms. Pederson with the proposition that she join with him in forming a limited partnership for the purpose of applying for the Germantown facility. Prior to

that time, Ms. Pederson had never previously met or spoken with Mr. Reardon (Tr. 1977). He told Ms. Pederson, at their initial and only meeting (Tr. 2138), that he was looking for someone to manage the broadcast station and that he wanted to be a purely passive investor in the enterprise (Tr. 1979). Mr. Reardon supplied Ms. Pederson with a list of personal references which included the name of Mr. Siebert who was and is now associated with the law firm which represents Pederson (Tr. 1982, 1992), and Ms. Pederson, in turn, supplied Mr. Reardon with her personal references (Tr. 1981). Mr. Siebert referred Ms. Pederson to Stan Karas, a broadcast consultant, for the preparation of a budget for the construction and operation of the station (Tr. 2039, 2042-44), and to an engineering firm, Satellite Systems Engineering (Tr. 2090). Ms. Pederson subsequently retained both Mr. Karas and Satellite Systems Engineering (Tr. 2040, 2094-95). At some time prior to the filing of the Pederson application, Ms. Pederson was sent a copy of a limited partnership agreement either by Mr. Reardon or Mr. Siebert which she then took to her local attorney for review (Tr. 2197).

87. Ms. Pederson testified that both she and Mr. Reardon were represented by counsel in the negotiations over the terms of the agreement, and that Mr. Siebert provided advice as an F.C.C. consultant or specialist (Tr. 2196). Any changes in the draft agreement were identified by initials in the margin by both Mr. Reardon and Ms. Pederson (Tr. 1996, 2006-09, 2196-97). She testified that the Pederson's limited partnership agreement contains additional provisions added by Ms. Pederson's local counsel which were typed in the margins (Tr. 1996-97). With the exception of these changes, Ms. Pederson indicated that the agreement, as signed by the parties, was identical to the one sent to her (Tr. 2009-10).

88. Section 4.6 of the Pederson limited partnership agreement sets forth the rights and powers of the limited partner (Pederson, Ex. #6, p. 9). This section bears the initials of both Ms. Pederson and Mr. Reardon in the margin, thereby indicating that the language in this section was specifically modified in some manner from that contained in the initial draft limited partnership agreement (Tr. 2196-97). It is noted that this section, prior to its being amended on December 13, 1988, does not prohibit the limited partner, Mr. Reardon, from communicating with the general partner about the day-to-day operations of the business. Sections 8.2 and 8.3 of the agreement, prior to their being amended on December 13, 1988, provide that the limited partner can be elected as the successor general partner in the event that the general partner becomes incompetent by a majority vote of the partnership interests, and places the responsibility for making such a determination in the hands of the limited partner and not with a court of competent jurisdiction (Pederson, Ex. #6, p. 17).

89. As noted above, these sections were subsequently amended on December 13, 1988, a date after this proceeding was designated for hearing, to reflect a provision added to Section 4.6, prohibiting the limited partners from communicating with the general partner regarding the day-to-day operations of the business (Pederson, Ex. #6, pp. 23-24), and a modification to Section 8.3 specifying that the determination of the general partner's incompetence would be made by a court of competent jurisdiction (Pederson, Ex. #6, p. 24).

90. From the date Pederson's application was filed until 15 months thereafter, Pederson's partnership agreement did not contain the provisions set forth above further limiting the authority of the limited partner. As noted above, the limited partnership agreement did not prohibit the limited partner from communicating with the general partner on matters pertaining to the day-to-day operations of the business, or place the responsibility for determining the competency of the general partner in the hands of a court of competent jurisdiction as expressly required by the Commission for purposes of properly insulating the limited partner. The amendments of December 13, 1988 are clearly designed to remedy those defects. However, for our purposes here they cannot be recognized since to do so would amount to an impermissible comparative upgrade. Accordingly, for comparative purposes, the partnership agreement is considered not to contain all those provisions which the Commission considers necessary to properly insulate a limited partner from active involvement in the enterprise.

91. The evidence of record viewed as a whole, demonstrates that Mr. Reardon was the driving force behind the Pederson application. He, in effect, selected the general partner and communications counsel who, in turn, selected Pederson's broadcast consultant and its engineering firm. Ms. Pederson was not sought out because of her past broadcast experience, of which she has none, or Mr. Reardon's personal knowledge of her qualifications since she was unknown to him; he approached her because she is a resident of Germantown, Tennessee and a female; factors which, he certainly knew, when attributed to a 100 percent full-time integration pledge would place Pederson at a very high comparative standing vis-a-vis the other applicants in this proceeding. Mr. Reardon also supplied the draft limited partnership agreement, secured the necessary financing and has assumed the major responsibility for the costs of prosecuting the application. These factors, when considered along with the non-insulating partnership agreement, make it quite clear that Mr. Reardon was not and is not the passive insulated investor, which would entitle Ms. Pederson to be considered the sole principal in control of the entity.

92. There is some evidence in the record that the Pederson principals have made a conscious effort to make it appear that Ms. Pederson's contribution to the application process was more significant than it was. A September 4, 1987, letter from Mr. Reardon to Ms. Pederson indicates that Ms. Pederson explained to Mr. Reardon the Commission's financial certification process (Walton, Ex. #29). Such a statement coming from an experienced broadcaster and past owner of an operating FM station in Haysville, Kansas to an individual with no prior experience in broadcasting or in applying for broadcast authority has a decidedly hallow ring, lending further weight to the conclusion that Pederson deliberately sought to create the appearance that Ms. Pederson was in control of the application.

93. The Presiding Judge, therefore, concludes that Pederson is entitled, at the very most, to only a 20 percent full-time integration credit, representing Ms. Pederson's equity interest in the applicant, for its proposal to integrate Ms. Pederson into a management position at the station on a full-time basis. However, Ms. Pederson's testimony at the hearing to the effect that she views the Pederson project as a five year commitment raises serious questions as to the permanency of her integration com-

mitment (Tr. 2099, 2139-41). The Commission in its so-called Policy Statement indicates that an integration proposal must be adhered to on a permanent basis. *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395 n. 6 (1965). Therefore, the Presiding Judge further finds that Ms. Pederson has not met the burden of establishing the permanence of her integration commitment, and on that basis alone, Pederson is not entitled to any integration credit under the best practicable service criterion. *See Doylan Forney* 3 F.C.C. Rcd. at 6330, 6334 (Rev. Bd. 1988).

94. In the event, however, that it is determined, at a later stage in this proceeding, that Ms. Pederson's integration pledge is entitled to credit, Pederson would receive qualitative enhancements for her local residence in the community of license as well as within the 3.16 mV/m contour of Pederson's proposed station, with some civic involvement, and for her gender.

GRACELAND BROADCASTING, INC.

FINDINGS OF FACT

95. Graceland is a corporation organized under the laws of the State of Tennessee. It is authorized to issue 100,000 shares of voting stock, of which 1,000 have actually been issued (Tr. 2303). Its officers, directors, and shareholders are as follows: James J. Nathan, President/Director, with a 47% voting stock interest; Charles A. Scruggs, Vice President, Director, with a 3% voting stock interest; William Blake Tanner, Jr., Secretary/Treasurer/Director, with a 47% voting stock interest; and Phillip E. Risinger, Director, with a 3% voting stock interest (Graceland, Ex. #1, p. 1).

Diversification

96. Neither Graceland nor any of its shareholders has an interest in any medium of mass communications (Graceland, Ex. #1, p. 1). In the event of a grant of Graceland's application, James Nathan proposes to terminate his employment position at WTMT(AM), Louisville, Kentucky (Graceland, Ex. #1, 1).

Best Practicable Service

James J. Nathan

97. Mr. Nathan will work forty (40) hours a week or more at the station as its General Manager. As General Manager, Mr. Nathan will establish overall station policy, be responsible for the day-to-day management and operations of the station, and implement the applicant's Model E.E.O. Program. He will also bear the ultimate responsibility for the stations' compliance with F.C.C. Rules and Regulations. In order to effectuate his proposal, Mr. Nathan will terminate his position as Promotions Director at station WTMT(AM), Louisville, Kentucky (Graceland, Ex. #1, p. 1).

98. Mr. Nathan was born in Memphis, Tennessee in 1925 and lived there until the age of 18 (Graceland, Ex. #1, p. 2). In the event that Graceland is awarded the Germantown permit, Mr. Nathan will move to Germantown and establish his residence there (Graceland, Ex. #1, pp. 1-2).

99. Mr. Nathan is currently Promotions Director at station WTMT(AM), Louisville, Kentucky. From 1967 to 1977, Mr. Nathan was the full-time General Manager of station WHEL(AM), New Albany, Indiana, and from 1955 to 1966, he was General Manager of station WINN(AM), Louisville, Kentucky (Graceland, Ex. #1, p. 2).

William Blake Tanner, Jr.

100. Mr. Tanner proposes to work forty (40) hours or more a week at the Graceland station as its Station Manager. In this role, he will be responsible for the daily implementation of the policy of the station as established by the General Manager, and he will have immediate managerial authority over the station's various department heads and staff (Graceland, Ex. #2).

101. Mr. Tanner is currently a resident of Memphis, Tennessee which is located within the station's proposed service area. He has resided continually in Memphis since 1961, except for the period of time between 1985 and 1987 when he lived in Atlanta, Georgia (Graceland, Ex. #2). From 1978 to 1983, Mr. Tanner helped organize and administer an annual promotional event for the Danny Thomas/St. Jude's Golf Classic. The event was held within Graceland's proposed service area, and Mr. Tanner volunteered from 30 to 40 hours of his time to this event each year (Graceland, Ex. #2; Tr. 2295-96).

Charles Scruggs

102. Mr. Scruggs, a Black male, will work forty (40) hours or more a week at the station as its Director of Sales. In this role, he will be responsible for managing and supervising the station's sales staff as well as implementing its sales policy as established by both the General and Station Managers (Graceland, Ex. #3, p. 1).

103. Mr. Scruggs has been a resident of Memphis, Tennessee since 1972 (Graceland, Ex. #3, p. 1). From 1976 until June 1989, Mr. Scruggs was a member of the Memphis Rotary Club, and served as secretary of the organization in 1982, as well as on its special projects committee and as a member of the Club's Teacher Initiative Grant Program. He also participated in the Rotary's annual Goal Motivation Day held in the Memphis, Tennessee public schools (Graceland, Ex. #3, p. 2). Since 1982, Mr. Scruggs has been a board member of both the Community Foundation of Greater Memphis and the Memphis Plough Community Foundation. These organizations generate and award funding for local non-profit organizations in the Memphis area. Since 1988, Mr. Scruggs has been a member of the President's Circle, an organization serving Christian Brothers College in Memphis, Tennessee (Graceland, Ex. #3, pp. 2-3). He is also a board member of the Memphis Speech and Hearing Center which meets quarterly to approve budgets and public relations programs and to request funding (Graceland, Ex. #3, p. 3). In addition, Mr. Scruggs is a board member of the WDIA Goodwill Fund, a non-profit organization which raises funds from which grants are made to local community organizations (Graceland, Ex. #3, 3), and he is also a founding member of the Lorraine Civil Rights Museum Foundation, founded in 1982, for the purpose of establishing a National Civil Rights Museum in Memphis, Tennessee (Graceland, Ex. #3, p. 3).

104. Mr. Scruggs' professional career in broadcasting began in 1953 when he was hired as an announcer at WCIN (AM), Cincinnati, Ohio. He worked there until

1962, during which time he was promoted to the position of Music Director and Program Director. In 1962, he began working at station KSAN(AM), San Francisco, California, where he served as a morning announcer and Program Director, and in 1964, he began working as an announcer at station KDIA(AM), Oakland, California. Mr. Scruggs was subsequently promoted to Program Director/Music Director in 1968 and, finally, to the position of Operations Manager in 1970. In 1972, he began serving as Vice President/General Manager of station WDIA(AM)/WAID(FM), in Memphis, Tennessee and remained in that position until 1982 when he was appointed Vice President of Viacom International's Radio Division. Mr. Scruggs left Viacom International in 1984 (Graceland, Ex. #3, pp. 1-2). He is currently General Manager of stations KWAM(AM) and KRNB(FM), Memphis, Tennessee. In the event of a grant of the Graceland application, Mr. Scruggs will terminate his employment with stations KWAM(AM) and KRNB(FM) in order to effectuate his integration proposal. *See Order* (FCC 90M-19) released in this proceeding on January 5, 1990.

Auxiliary Power

105. Graceland proposes to install an auxiliary power generator at its proposed broadcast facility (Graceland, Ex. #1, p. 1).

CONCLUSIONS OF LAW

Diversification

106. Graceland's application is not subject to any diversification demerit.

Best Practicable Service

107. The Commission does not require, for purposes of awarding an integration credit, that there be written documentation of an applicant's ownership structure on or before the B cut-off date. *See Coast TV* 4 F.C.C. Rcd. 1786, 1788 (1989) and *Victory Media Inc.* 3 F.C.C. Rcd. 2073 (1988). Therefore, the fact that Graceland was not incorporated until March 1988 (Tr. 2265-66) a date subsequent to the filing of its application (Tr. 2264-65) and the B cut-off date does not preclude the award of integration credit to Graceland based on its present ownership structure.

108. Applicant is composed of a single class of stockholders. Although Mr. Nathan has assumed most of the responsibilities for prosecuting the application, Mr. Tanner initiated the first contact with Mr. Nathan (Tr. 2258), provided the name of the real estate agent who could locate a tower site for the applicant (Tr. 2261), discussed the terms upon which the site would be made available (Tr. 2262), participated in the decision to adopt the corporate structure (Tr. 2263), as well as in the decision to bring Mr. Scruggs and Mr. Risinger into the organization as voting shareholders (Tr. 2264). In addition, Mr. Tanner conferred with communications counsel regarding the Commission's financial requirements (Tr. 2281-2282), obtained a commitment letter for the necessary funds to construct and operate the station (Tr. 2282), and discussed with Mr. Nathan the costs of the project, station's staffing and hours of operation as well as the station's format (Tr. 2258, 2359). At present Mr. Nathan and Mr. Tanner are responsible on a 50/50 basis for Graceland's expenses; however, after a grant, expenses would be allocated on a pro-rata basis among the various shareholders (Tr. 2320-21).

109. The record fails to disclose any evidence which calls into question the commitments of the Messrs. Nathan, Tanner and Scruggs to be integrated into the affairs of their proposed station or their ability to meet their commitments. As to Mr. Tanner, about whose integration commitment questions have been raised, there has been no showing that he will not terminate his present employment in order to effectuate his integration proposal. In fact, Mr. Tanner's direct testimony clearly indicates that he will do so (Tr. 2316-17). Accordingly, the Presiding Judge finds that Graceland is entitled to a 97 percent quantitative integration credit which represents the percentage of its ownership which it intends to integrate into the management of its station.

110. The credit awarded Graceland for Mr. Nathan's integration pledge is qualitatively enhanced by Mr. Nathan's decision to move to Germantown, Tennessee and to a slight degree by his past broadcast experience. The record demonstrates that his remarks about moving to Florida were made in jest and they are discounted (Tr. 2421). Mr. Tanner's quantitative integration credit is qualitatively enhanced by his long-term residence within the station's proposed service area with some civic involvement, and the credit awarded Graceland for Mr. Scruggs' commitment is qualitatively enhanced by the fact that he is a Black American and a long-term residence of Memphis, Tennessee with some civic involvement, and, finally, to a slight degree by past broadcast experience.

OMNI BROADCASTING CORP.

FINDINGS OF FACT

111. Omni is a Tennessee corporation. Its officers, directors and stockholders are as follows: Sally Wilbourn, President, Treasurer and Director with a 51% ownership interest; Sam C. Phillips, Vice President, Secretary and Director with a 49% voting stock interest (Omni, Ex. #1).

Diversification

112. Sam C. Phillips is President, Treasurer, a Director and a 8.6% stockholder of Big River Broadcasting Corp. (Big River) and Sally Wilbourn is a Director and a 3.0% stockholder. Big River is the licensee of station WSBM(AM) and WQLT(FM), Florence, Alabama (Omni, Ex. #3). Mr. Phillips is also a 51% partner in Gold Coast Broadcasting Company (Gold Coast) (Omni, Ex. #3). Gold Coast is the licensee of station WLVS (AM), in Lake Worth, Florida. In the event that Omni's application is granted, Mr. Phillips and Ms. Wilbourn will divest themselves of their interests in the licensees of stations WSBM, WQLT(FM) and WLVS, prior to the commencement of program test authority for the Germantown station (Omni, Ex. #3).

Best Practicable Service

Sally Wilbourn

113. Ms. Wilbourn, a non-minority female, will be integrated on full-time basis, at least forty (40) hours a week, into the day-to-day operations of the proposed station as General Manager. In that position, she will be responsible for the overall operations of the station, including the supervision of the station's employees (Omni, Ex. #2; Tr. 2584, 2636).

114. Ms. Wilbourn has resided in Memphis, Tennessee at a point located within the 3.16 mV/m contour of the proposed station since 1968. Ms. Wilbourn has not been involved in any civic activities which are entitled to credit under the best practicable service criterion (Omni, Ex. #2).

115. Ms. Wilbourn since 1965 has performed a number of duties for the licensee of station WLVS, in Lake Worth, Florida. These duties have included bookkeeping, accounts payable work, the preparation of payroll, tax forms and financial reports, license renewal applications, and F.C.C. ownership and equal employment opportunity reports (Omni, Ex. #2, p. 4). Ms. Wilbourn has had similar responsibilities for stations WXOR and WQLT(FM), Florence, Alabama since 1973, in addition to participating in the development of the stations' programming (Omni, Ex. #2, p. 5).

116. Beginning in 1973, Ms. Wilbourn was also involved in the operations of stations WWEE and WEZI, Germantown, Tennessee, serving in a number of capacities, including but not limited to, Operations Manager, Program Director, Office Manager, Music Director, and Public Affairs Director. Her duties at WEZ1, Germantown, Tennessee, also included overseeing the bookkeeping department, preparing budgets for the station's advertising and promotions, attending sales meetings as well as making programming decisions. She also served as Program Director/Music Director and she prepared work schedules and approved wage increases, prepared financial statements, tax reports, F.C.C. ownership and E.E.O. reports, and license renewal applications for both Germantown stations. In addition, Ms. Wilbourn made decisions on public affairs programming for both stations and made certain that the stations were operated in compliance with the F.C.C. Rules and Regulations (Omni, Ex. #2, pp. 7-8). The licenses for stations WWEE and WEZ1, Germantown, Tennessee were assigned during February 1987 (Omni, Ex. #2, p. 8).

Sam C. Phillips

117. Mr. Phillips will be integrated full-time, at least forty (40) hours a week into the day-to-day operation of the proposed station as Business Manager. He will be responsible for supervising and coordinating the sales and programming activities and efforts of the station. He has resided within the 3.16 mV/m contour of Omni's proposed station, since 1957 (Omni, Ex. #2, 3). Mr. Phillips has not engaged in any civic activities within the proposed service area which are entitled to credit under the best practicable service criterion.

118. Since 1973, Mr. Phillips has exercised general supervision over all aspects of station WLVS, Lake Worth, Florida's operations, including the station's programming, as well as the technical and financial matters affecting the station. He was and is also responsible for the overall policy of the station (Omni, Ex. #2, p. 3). Since March 1, 1973, Mr. Phillips has had similar responsibilities and duties for stations WXOR and WQLT, Florence, Alabama (Omni, Ex. #2, p. 4). Mr. Phillips was also involved in the construction and installation of station WWEE, Memphis, Tennessee which was later licensed to Germantown, Tennessee (Omni, Ex. #2), as well as with the construction and operation of FM station WEZI (FM), Germantown, Tennessee. As President of the licensee of these Germantown, Tennessee stations, Mr. Phillips was responsible for their overall operations and policies. He also supervised all aspects of the stations' operations on almost a day-to-day basis, and he regularly consulted with both station management and with the station's employees concerning the operations of these stations. At times, Mr. Phillips served as General Manager, Station Manager and Operations Director for these stations (Omni, Ex. #2, p. 7).

Auxiliary Power

119. Omni will install an auxiliary power generator at both the studio and transmitter sites to insure continued broadcast service in the event of a disruption or failure of the normal power source (Omni, Ex. #4).

CONCLUSIONS OF LAW

Diversification

120. Omni has no cognizable media interests and, therefore, is not subject to a diversification demerit.

Best Practicable Service

121. Omni claims a 100 percent quantitative integration credit on the basis of its proposal to integrate both of its principals, Mr. Phillips and Ms. Wilbourn into the affairs of its station on a full-time basis. An attempt was made to discredit this claim, since Omni's principals have never before served on a full-time basis as on-site management personnel at any other facility with which they were associated. However, the manner in which these individuals have conducted their businesses in the past does not necessarily dictate their future actions. Accordingly, the argument is dismissed as based on pure speculation.

122. It was Ms. Wilbourn's idea to form Omni and to apply for the Germantown, Tennessee channel (Tr. 2581; 2651), and Mr. Phillips testified that he would not have gotten involved in the application if it had not been for Ms. Wilbourn's interest in the project (Tr. 2653). Ms. Wilbourn contacted her accountant regarding Omni's structure and its formation (Tr. 2582) and communications counsel, and she and Mr. Phillips prepared the application (Tr. 2618, 2669). She also drafted the corporation's by-laws (Tr. 2613-14), and decided that she would hold 51 percent of the stock, giving her controlling interest in the corporation (Tr. 2583). Ms. Wilbourn paid for her stock (Tr. 2617, 2674) and has paid 51 percent of Omni's expenses (Tr. 2625), using her own money (Tr. 2675). In addition, she has prepared a list of the costs of the construction and operation of Omni's proposed station (Tr. 2619-20) and she will pay 51 percent of these costs from her own assets (Tr. 2627). Ms. Wilbourn prepared Omni's equal employment opportunity program

(Tr. 2621) and she and Mr. Phillips developed the roles the Omni principals will fill at the station (Tr. 2581, 2584-85).

123. Ms. Wilbourn, like Mr. Phillips, is not new to broadcasting. She has for a number of years helped Mr. Phillips manage the various broadcast interests. The evidence of record indicates, specifically, that she has handled accounting and other financial matters, E.E.O. and ownership reports for the F.C.C., as well as signed checks for the payment of bills for these facilities (Tr. 2589, 2591-93, 2595-96, 2657). The business relationship between Mr. Phillips and Ms. Wilbourn has existed for sometime, and has been, apparently, a successful one, and there is no reason to doubt their announced intention to continue this relationship by owning and operating jointly the new facility in Germantown, Tennessee.

124. The fact that Mr. Phillips maintains a second home in Eastport, Mississippi, (Tr. 2678) does not in any way raise questions as to the genuineness of the integration commitment of both principals. Although the home in Eastport is furnished with personal items and Mr. Phillips spends as long as an entire week there, he considers himself to be a Tennessee resident and he holds a Tennessee driver's license. Mr. Phillips pays income tax to the State of Tennessee, he votes in Shelby County, Tennessee, and has stated that he considers Memphis, Tennessee to be his home town (Tr. 2667, 2683-84). The record supports his claim that Memphis, Tennessee is his principal residence, and that the Eastport home serves merely as a vacation home.

125. The Presiding Judge concludes, therefore, that Omni is entitled to a 100 percent quantitative integration credit for its proposal to integrate on a full-time basis its two principals into the management of the station. This quantitative integration credit of 100 percent is qualitatively enhanced by Mr. Phillips long term residence within the 3.16 mVm contour of the proposed station and by his past broadcast experience, and by Ms. Wilbourn's gender, her long-term residence within the 3.16 mV/m contour of the proposed station and by her past broadcast experience.

GERMANTOWN BROADCASTING CORPORATION

FINDINGS OF FACT

126. GBC is a corporation organized under the laws of the State of Tennessee with one class of stock. A total of three hundred shares have been issued: 285 shares to Mr. A. J. Hendrickson and 15 shares to Mr. William E. Taylor. The stock subscription agreement provides that any purchases of additional shares in the future shall be in the same 95/5 ratio (GBC, Ex. #1).

Diversification

127. The corporate applicant, GBC, does not have any ownership interests in any medium of mass communications (GBC, Ex. #4).

128. Mr. Hendrickson is President, a Director and holder of 72.73% of the outstanding stock of Andrew Jackson Broadcasting Corporation, the licensee of stations WKBJ and WYNU(FM), Milan, Tennessee. He is also employed full-time as General Manager of the stations. Mr. Hendrickson has made a timely commitment to divest that ownership interest as well as sever all connections with stations WLBJ and WYNU(FM) if GBC's application is granted (GBC, Ex. #2, 2; GBC, Ex. #4, p. 1).

129. Mr. Taylor is also an officer of Andrew Jackson Broadcasting Corporation, the licensee of stations WKBJ and WYNU(FM), Milan, Tennessee and he is employed full-time as Sales Manager. Mr. Taylor has made a timely commitment to sever these relationships in the event that GBC's application is granted (GBC, Ex. #3, p. 2; GBC, Ex. #4, p. 1).

Best Practicable Service

A. J. Hendrickson, Jr.

130. Mr. Hendrickson will be integrated into the management of GBC's proposed station on a full-time basis. He will be employed at least forty (40) hours a week, as General Manager, with ultimate day-to-day responsibility for all aspects of the station's operations (GBC, Ex. #2, p. 1).

131. In the event that GBC is the successful applicant, Mr. Hendrickson will move to a residence within the 3.16 mV/m contour of GBC's proposed station (GBC, Ex. #2, p. 1).

132. In 1951, Mr. Hendrickson began working full-time for station WCOR, in Lebanon, Tennessee as a sports announcer and copy writer. From 1952 to 1959, Mr. Hendrickson was an announcer as well as a salesman for station WCOR in its auxiliary studio/sales office in Carthage, Tennessee. Early in 1959, he returned to station WCOR, Lebanon, Tennessee as a news and sports announcer and salesman (GBC, Ex. #2, pp. 1-2), and later in 1959, Mr. Hendrickson became Assistant General Manager of stations WCOR and WCOR(FM). In 1972, he was promoted to General Manager, and he held that position until 1979. Since March 1987, Mr. Hendrickson has been employed full-time as General Manager of stations WKBJ and WYNU (FM), Milan, Tennessee. Mr. Henderickson is also President, a Director and controlling shareholder of the corporate licensee of those stations (GBC, Ex. #2, p. 2).

William E. Taylor

133. Mr. Taylor will be integrated into the management of the proposed station as Sales Manager working at least forty (40) hours a week. He will be responsible for establishing and implementing sales and promotion policies, and he will supervise all day-to-day sales and promotional activities for the station (GBC, Ex. #3, p. 1).

134. Mr. Taylor has indicated that he will move to a residence within the predicted 3.16 mV/m contour of GBC's proposed station in the event that GBC is the successful applicant (GBC, Ex. #3, p. 1).

135. Mr. Taylor has been employed full-time in the radio broadcasting business since 1959. He served as an announcer at station WIRJ, Humboldt Tennessee, from June 1959 to November 1963, and from November 1963 to July 1967, as an announcer and salesman at station WENK, Union City, Tennessee (GBC, Ex. #3, p. 1). From July 1967 to March 1984, Mr. Taylor was a announcer and salesman at stations WPAD and WPAD-FM, Paducah, Kentucky, and he also served as Music Director at those stations for seven years, and then as Sales Manager from 1974 to 1984. He subsequently held the position of General Manager and served as a morning air

personality at station WALR, Union City, Tennessee until April 1985, when he became Sales Manager of stations WKBJ and WYNU(FM), Milan, Tennessee; a position he continues to hold. In that position, Mr. Taylor establishes and implements sales policies and manages all day-to-day activities of the station's sales staff (GBC, Ex. #3, p. 2).

Auxiliary Power

136. GBC proposes to install auxiliary power generating equipment at both its studio and transmitter locations (GBC, Ex. #5).

CONCLUSION OF LAW

Diversification

137. GBC is not subject to any diversification demerit.

Best Practicable Service

138. GBC claims a 100 percent quantitative integration credit on the basis of its proposal to intergrate its two principals, Messrs. Hendrickson and Taylor into the affairs of its proposed station. There is no evidence of record which raises any doubts as to the sincerity of their commitments or their ability to carry them out. The fact that Mr. Hendrickson intends to maintain a residence in Lebanon, Tennessee (Tr. 2945-46) in addition to a home in the Germantown, Tennessee area (Tr. 2946) in no way disputes his claim that he will move to the Germantown area and make that his principal residence. It is noted that Mr. Hendrickson presently lives in Jackson, Tennessee in order to manage his Milan, Tennessee station while still maintaining his second home in Lebanon, Tennessee (Tr. 2946). Although previously semi-retired (Tr. 2950), Mr. Hendrickson testified that he got bored with retirement (Tr. 2933), and that he has no desire to repeat the experience (Tr. 2933). During his brief period of retirement, Mr. Hendrickson bought the Milan, Tennessee station, and was personally and exclusively involved as an owner in upgrading the station (Tr. 2947, 2952). In any case, Mr. Hendrickson has specifically disavowed any plan for early retirement (Tr. 2933).

139. The Presiding Judge concludes that there is absolutely no basis in the record for challenging GBC's integration commitment, and that it is entitled to a 100 percent quantitative integration credit for its proposal to integrate its two principals, Mr. Taylor and Mr. Hendrickson into the affairs of its station. The quantitative integration credit awarded GBC is qualitatively enhanced by Mr. Hendrickson and Mr. Taylor's decisions to move to a location within the predicted primary coverage area of GBC's proposed station and by their past broadcast experience.

COMPARATIVE COVERAGE

140. The applicants to this proceeding submitted a joint engineering exhibit which sets forth the areas and populations which will be served by each applicant. The figures are as follows:

Applicant	Area (sq. km.)	Population
Walton	1,823	715,074
Nor-Dot	1,815	712,903
Henderson	1,845	708,055
Novella	1,829	711,239
Botts	1,839	715,074
AIBG	1,871	296,505
Pederson	1,833	549,521
Graceland	1,826	584,552
Omni	1,854	606,661
Germantown	1,830	715,074

141. The exhibit further demonstrates that during the day light hours, none of the applicants will provide service to any underserved areas. During the hours of darkness, with the exception of an area of approximately 20 square kilometers with a total population of approximately 2,000 people, all of the areas proposed to be served by the applicants are presently served by five or more commercial FM broadcast stations. AIBG, alone among the applicants, will provide service to the underserved 20 square kilometer area referenced above (Joint Engineering, Ex. #1).

142. The evidence of record indicates that the areas and populations within the applicants' proposed service areas are well served. Although AIBG proposes a predicted fifth service to 2,010 persons who reside within the 20 square kilometer area, this additional service is too insignificant to merit awarding AIBG a comparative preference. Furthermore, as the figures set forth above indicate, the other applicants would be entitled to a slight preference over AIBG for the overall service they propose to provide. Finally, Henderson, Nor-Dot, Novella, the Botts, Germantown and Walton would each be entitled to a very slight preference for superior coverage over Omni, Pederson and Graceland, but as among themselves, no preference would stand, since they propose virtually identical coverage (Joint Engineering, Ex. #1).

ULTIMATE CONCLUSIONS

143. As noted above, there are three applicants that have been found to be entitled to a 100 percent full-time quantitative integration credit. They are as follows: Walton, Omni, and Germantown. Graceland has been awarded a 97 percent quantitative integration credit. In light of the minimal difference between the quantitative integration credit awarded Graceland and that given to Walton, Omni and Germantown, all four of these applicants are considered to be on an equal footing at this stage in the comparative exercise. Furthermore, all four of the above applicants are not subject to any diversification demerit and all four propose installing an auxiliary power source.

144. However, Germantown and Walton would each be entitled to a very slight preference for superior coverage over Omni and Graceland. As between Germantown and Walton and than Graceland and Omni, no preference would stand since they propose virtually identical coverage.

145. In looking at the qualitative enhancements to which each applicant is entitled, it is possible to make meaningful distinctions between these four applicants, and then point to that proposal which would best serve the public interest, and, finally, to rank the remaining three. Walton is the clear winner. Mr. Walton is a Black, sole proprietor who has lived, since 1975, within the 1 mV/m contour of his proposed station with a moderate amount

of civic involvement and with extensive past broadcast experience. Furthermore, as noted above, his proposal is entitled to a very slight preference for superior coverage over that of Omni which, as indicated below, is ranked second and over Graceland which places third. Walton's 100 percent minority ownership and service area residence places it above Omni which has 100 percent service area residence, with 51 percent female but no minority ownership. It places second because of the qualitative enhancements noted above and by the past broadcast experience of its two principals. Whereas Graceland, which places third, has only 50 percent service area ownership with some civic involvement and 3 percent minority ownership, with 50 percent of its quantitative integration credit entitled to a further, slight enhancement for past broadcast experience. Germantown with no minority integrated principals and no local or service area ownership places fourth.

Rulings

146. For failure to show good cause, the Joint Motion to Strike filed by Eugene Walton, Henderson Broadcasting of Memphis, Inc., David J. Bott and Carese C. Bott, American Indian Broadcast Group, Inc., Graceland Broadcasting, Inc., Germantown Broadcasting Corp., Omni Broadcasting Corp., and Nor-Dot Broadcasting, Inc. on March 27, 1990 IS DENIED.

147. And IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Eugene Walton (File No. BPH-879904MS) for authority to construct a new FM station or Channel 298A in Germantown, Tennessee IS GRANTED; and that the applications of Nor-Dot Broadcasting, Inc. (File No. BPH-870908MI), Henderson Broadcasting of Memphis, Inc. (File No. BPH-870908MJ), Novella Broadcasting Company, L.P. (File No. BPH-870908MM), David J. Bott and Carese C. Bott, Joint Tenants (File No. BPH-870908MN), American Indian Broadcast Group, Inc. (File No. BPH-870908MQ), Pederson Communications Limited Partnership (File No. BPH-870908MS), Graceland Broadcasting, Inc. (File No. BPH-870908MT), Omni Broadcasting Corp. (File No. BPH-870908MV), and Germantown Broadcasting Corp. (File No. BPH-870908MY) ARE DENIED;[1] and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-36

In the Matter of

Inquiry into the Need to Preempt
State and Local Laws Concerning
Amateur Operator Use of
Transceivers Capable of Reception
Beyond the Amateur Service
Frequency Allocations.

NOTICE OF INQUIRY

Adopted: February 13, 1991; Released: February 28, 1991

By the Commission:

I. INTRODUCTION

1. On November 14, 1989, the American Radio Relay League, Incorporated (ARRL) filed a *Request for Issuance of Declaratory Ruling* [1] requesting that the Commission preempt certain state statutes and local ordinances affecting transceivers[2] used by Amateur Radio Service licensees. Some of these laws are so broad as to prohibit mere ownership of such transceivers if they are capable of reception of communications on certain frequencies other than amateur service frequencies. On March 15, 1990, we released a public notice [3] inviting comment on ARRL's request. Although comments were received supporting ARRL's position, no comments were received addressing certain technical issues that are before us in this matter. Furthermore, the majority of comments addressed a broader preemption than was discussed in our public notice. We initiate this present inquiry to assist us further in considering ARRL's request.

II. BACKGROUND

A. State and Local Laws

2. The ARRL request discusses eleven state statutes and one local ordinance. These laws are commonly known as "scanner laws," the violation of which is typically a criminal misdemeanor, with equipment confiscation a possibility.[4] The New Jersey statute is representative of these laws:

> Any person who installs or has in any automobile, a short-wave radio receiver operative on frequencies assigned by the Federal Communications Commission for fire, police, municipal or other governmental uses, is guilty of a misdemeanor, unless a permit therefor has first been obtained from the chief of the county police, or from the chief of the police of the municipality, wherein such person resides.
>
> This section does not apply to any fire, police or other governmental official of the State or of any county or municipality thereof.[5]

This statute regulates the mere acts of installing or possessing in a vehicle certain receivers, and it includes a permit requirement for those who are not governmental officials. Also, although the New Jersey statute prohibits the capability to receive "fire, police, municipal or other governmental" channels, our review of the subject laws cited by ARRL indicates that most of the statutes at issue are more narrowly drawn to prohibit the capability to receive police channels.

3. Most of these laws are directed primarily toward frequency reception capability by equipment located in vehicles, but at least one law reaches possession of this equipment merely outside the home.[6] Some laws, however, specifically exempt amateur operators who possess equipment in motor vehicles.[7] These state and local laws appear to be aimed at promoting the health, safety, and general welfare of the citizenry.[8]

B. The ARRL Declaratory Ruling Request

4. ARRL makes two arguments in support of preemption. First, it states that the receiver sections of the majority of commercially available amateur station transceivers can be tuned slightly past the edges of the amateur service bands to facilitate adequate reception up to the end of amateur service bands. ARRL seeks a preemption ruling that would permit amateur operators to install in vehicles transceivers that are capable of this "incidental" reception.[9] Although ARRL's formal request is couched in terms of this first, technical point, the request focuses almost entirely on a second, broader issue of whether state and local authorities should be permitted, via the scanner laws, to prohibit the capability of radio reception by amateur operators on public safety and special emergency frequencies that are well outside the amateur service bands.

5. In regard to the broader issue, ARRL argues that amateur operators have special needs for broadscale "out-of-band" reception, and that the marketplace has long recognized these needs by offering accommodating transceivers. According to ARRL,[10] many commercially manufactured amateur service HF transceivers and the majority of such VHF and UHF transceivers have non-amateur service frequency reception capability well beyond the "incidental" -- they can receive across a broad spectrum of frequencies, including the police and other public safety and special emergency frequencies here at issue. This additional capability, argues ARRL, permits amateur operators to take part in a variety of safety activities, some in conjunction with the military and, for example, the National Weather Service, that are legitimately available to amateur operators. Such activities benefit the public, especially in times of crisis, and some require the mobile use of the amateur stations.[11] ARRL states that the "vast majority" of amateur operators take part in these mobile activities, and that the widespread enforcement of laws such as New Jersey's would make illegal the possession of "essentially all" modern amateur mobile equipment.[12] (As of January 31, 1991, the Commission's licensing database indicates that there are 502,133 amateur station licenses in the United States and its territories and possessions.) ARRL states that, as a result of scanner laws,

"several dozen instances of radio seizure and criminal arrest [have been] suffered by licensed amateurs in recent months."[13]

C. Comments

6. In response to our public notice on this matter, we received 45 comments, including one from ARRL, and no reply comments. All support ARRL's broader request and almost all appear to be from amateur operators. Twenty-four comments are from individuals who are aware of one or more of the subject laws and express support for ARRL's position in very general terms. Of the twenty-one remaining comments, four are from individuals who have had first-hand experience with such laws, where law enforcement warnings or confiscation have resulted from transceiver possession. Five are from individuals in law enforcement, either currently or formerly. Six are from the following associations and organizations: Association of North American Radio Clubs, Associated Public-Safety Communications Officers, Spectrum Resources, Uniden America Corporation, Personal Radio Steering Group (which requests that we extend this proceeding to cover General Mobile Radio Service licensees), and Utilities Telecommunications Council (which requests that we extend this proceeding to cover other mobile licensees that wish to receive fire and other public safety service transmissions). Although this inquiry is primarily focused on the Amateur Radio Service, we additionally take this opportunity to request comment on whether the scanner laws are affecting other licensed radio services.

7. ARRL describes an incident in which a licensed amateur operator who resided in New York was driving his vehicle through New Jersey when the New Jersey police, acting under authority of the New Jersey statute, stopped him, arrested him, and confiscated his VHF amateur service transceiver. ARRL notes that the New York licensee, as a non-resident of New Jersey, would not be eligible to obtain the operator's permit required by the New Jersey statute for receiver operation within New Jersey.[14] Another commenter, a licensed amateur operator, states that although he is a New Jersey resident, his request for a permit under the New Jersey statute has been denied by the local issuing authority on the ground that the authority issues the permits only to "emergency personnel."[15] In three other comments, amateur operators state that while traveling in vehicles in Illinois, Ohio, New Jersey, and Texas, they have been stopped by state or local police and threatened with the possibility of confiscation of their mobile amateur service transceivers.[16]

8. A few commenters state that they have found vital to their volunteer safety work the use of certain out-of-band channels used in governmentally sponsored activities such as the Civil Air Patrol's search and rescue undertakings. Another commenter explains how use of his out-of-band receiver allowed him to listen to the National Weather Service on VHF maritime channels for critical information during a flood. These commenters emphasize that there is a public service value in having their transceivers be capable of receiving these channels, which are not amateur, public safety, or special emergency services frequencies.[17]

9. As noted above, Associated Public-Safety Communications Officers, Inc. (APCO) filed a comment in support of the ARRL Request. APCO is this nation's oldest and largest public safety communications organization representing the public safety radio community. APCO states:

> Every radio amateur is not the law-abiding citizen we would prefer them to be. However, it is patently unfair to penalize the entire community for the actions of the few who utilized their equipment to circumvent the law. Amateur radio operators have, historically, been vital assets to the public safety community. They have assisted government and the public in virtually every disaster that has occurred throughout the world.
>
> There are other methods of protecting communications available to public safety, such as encryption, which is easy to procure and much less invasive of the the citizen's right (or privilege) to listen to what is being transmitted over the radio. APCO believes that, in this modern age, it is the responsibility of an agency to protect its own confidential communications through the use of technology, not by arresting innocent citizens.[18]

III. DISCUSSION

10. We believe additional information would assist us to make a decision in this matter.[19] For example, it would be helpful to have more information on the current (and future) marketplace availability of mobile equipment meeting the restrictions of the subject laws, and on the technical and financial feasibility of modifying existing equipment to meet the laws. We especially encourage the manufacturing community, which is best suited to comment on the current state of amateur radio technology, to provide this technical information. We also desire comment from the states and municipalities that have enacted the subject laws. Specifically, we solicit comment on the following questions:

> (1) Is there VHF or UHF mobile (or portable) amateur equipment now being manufactured that complies with the state and local laws in question? If so, give the purchase costs and the make and model numbers.
>
> (2) What percentage of existing VHF or UHF mobile amateur equipment has a reception capability (a) only on amateur service bands, (b) on the amateur bands plus a capability just beyond the amateur bands (within 25 kHz of the band edge), and (c) on the amateur bands plus a capability on (at the least) any of the public safety or special emergency services channels? What are the above percentages when calculated only in the context of equipment that is currently being manufactured (as opposed to equipment that no longer is manufactured or is built by an amateur)? What are the purchase costs for such equipment?
>
> (3) What percentage of amateur operators purchase and use manufactured mobile equipment?
>
> (4) What is necessary technically for manufacturers to produce equipment that complies with the laws, and what are the associated costs?

(5) What is required technically to modify amateur equipment that is capable of receiving on police radio service channels or other public safety or special emergency services channels to eliminate such reception capability, and what is the cost associated with such a modification? Does the intercategory sharing permitted in the private land mobile services[20] and the diversity of frequency restrictions throughout the country affect the technical requirements or costs of such modifications?

(6) What specific instances have occurred where the state and local laws in question have adversely affected amateur radio operation?

(7) Is there a public interest in having amateur equipment available that can receive non-amateur frequencies, *e.g.*, an interest in providing a pool of equipment that facilitates emergency operations in states where local authorities expressly desire the assistance of amateur licensees?

(8) Given that the amateur radio equipment market is essentially world-wide, what would be the effect, if any, on the availability and price of amateur equipment if United States requirements were made more restrictive than those of the rest of the world? Do any other countries have restrictions on amateur radio transceiver receipt of public safety transmissions?

(9) What effect do the scanner laws have on the interstate sale of amateur service equipment and the interstate transport of equipment by amateur licensees?

IV. PROCEDURAL MATTERS

11. Accordingly, we adopt this *Notice of Inquiry* under the authority contained in Sections 4(i), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 403. Pursuant to applicable procedures set forth in Sections 1.415, 1.419, and 1.430 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, & 1.430, interested parties may file comments on or before June 7, 1991, and reply comments on or before July 8, 1991. Extensions of these time periods are not contemplated. We will consider all relevant and timely comments before taking final action in this proceeding. In reaching its decision, the Commission may consider information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file and the fact of our reliance on such information is noted in any subsequent actions. As noted above in a footnote, comments filed pursuant to our previous public notice are deemed to be filed in response to this Notice of Inquiry as well, and therefore need not be refiled. We do not, however, discourage additional filings from the entities who filed previously.

12. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Persons who wish to participate informally may do so by submitting one copy. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The American Radio Relay League, Inc., Request for Declaratory Ruling Concerning the Possession of Radio Receivers Capable of Reception of Police or Other Public Safety Communications (Nov. 13, 1989) (hereinafter "ARRL Request").

[2] Radio equipment capable of both transmission and reception. We are concerned herein, however, only with reception capability. Transmission by amateur operators on unauthorized frequencies is prohibited.

[3] Public Notice, 5 FCC Rcd 1981 (1990), 55 Fed.Reg. 10805 (Mar. 23, 1990). Comments were due by May 16, 1990, and reply comments by May 31, 1990.

[4] Three of the laws, however, are "aiding and abetting"-type statutes, which would prohibit the use of any radio receiver in connection with criminal activity. *See* ARRL Request, *supra* note 1, at 10 n.7. Such statutes do not penalize a radio owner for mere possession of a radio receiver, but instead specify that, in the context of criminal activity, the unlawful act consists of both reception and divulgence (or use) of the communication. Such statutes are not addressed by this inquiry.

[5] N.J. Stat. Ann. § 2A: 127--4 (West 1985) (cited in part only). *See generally* note 8 *infra* (discussing case upholding New Jersey statute, which dates from 1933).

[6] *See* Ky. Rev. Stat. Ann. § 432.570 (Michie/Bobbs-Merrill 1985). Under Kentucky's statute, certain users are exempted, such as radio and television stations, sellers of the "scanner" radios, disaster and emergency personnel, and those using the weather radio service of the National Oceanic and Atmospheric Administration. Some such users need to obtain local governmental permits, others do not.

[7] *See, e.g.*, Minn. Stat. Ann § 299C.37 (West Supp. 1990); N.Y. Veh. & Traf. Law § 397 (McKinney 1986).

[8] Such was noted by a New Jersey court in upholding, on other than preemptive grounds, the constitutionality of New Jersey's law.

> [I]t seems reasonable to assume that there may have been a determination by the Legislature that if persons in automobiles could without restriction listen to fire, police or other governmental communications their high degree of mobility coupled with their possible desire to proceed to locations referred to in such communications, for reasons of curiosity or otherwise, might well result in interference with essential governmental activities. Likewise, the Legislature may have determined that if persons engaged in illegal activities were able to receive such information in their automobiles, they would become aware of their detection and their escape would be facilitated.

State v. Smith, 130 N.J. Super. 442, 446-47, 327 A.2d 462, 464-65 (1974).

[9] ARRL Request, *supra* note 1, at 1, 3 n.2, 5 n.3. "Most commercial amateur radio VHF and UHF transceivers . . . are incidentally capable of reception (but not transmission) on frequencies additional to those allocated to the Amateur Radio Service. These frequencies are adjacent to amateur allocations. This is true even though the equipment is primarily designed for amateur bands, and results from the intentional effort to insure proper operation of the transceiver throughout the entire amateur band in question." *Id.* at 3 n.2.

[10] *Id.* at 12.

[11] *See generally* House Comm. on the Judiciary, Electronic Communications Privacy Act of 1986, H.R. Rep. No. 647, 99th Cong., 2d Sess. 42.

[12] ARRL Request, *supra* note 1, at 2, 12.

[13] *Id.* at 11.

[14] Comments of the American Radio Relay League, Incorporated at 2-3 (May 16, 1990).

[15] Comment of Emory L. Brown, Jr. (Mar. 23, 1990).

[16] Comment of L.W. Bradford (May 1, 1990); Comment of Rich Casey (May 9, 1990); Comment of Todd L. Sherman (April 21, 1990).

[17] It should be noted that in the 30-50 MHz, 150-174 MHz, and 450-512 MHz bands the public safety and special emergency services channels are intermixed with frequencies allocated to non-public-safety services. Thus, eliminating the capablility to receive the public safety channels would have to be done on a case-by-case, frequency-by-frequency basis. In these segments of the spectrum, there does not exist a contiguous range of frequencies that constitute a "public safety band," with upper and lower frequency limits, that could more easily be excluded.

[18] Comments of APCO at 2-3 (May 16, 1990).

[19] Comments filed pursuant to our previous public notice are deemed to be filed in response to this Notice of Inquiry as well, and therefore need not be refiled. We do not, however, discourage additional filings from the entities who filed previously.

[20] *See* 47 C.F.R. § 90.176. For example, a Police Radio Service licensee may be authorized to operate on frequencies allotted to the Highway Maintenance Radio Service, the Forestry-Conservation Radio Service, or any other public safety land mobile service.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-533

In the Matter of

Cincinnati Bell Telephone Company Tariff F.C.C. No. 35	Transmittal Nos. 535 and 564
Southern New England Telephone Company Tariff F.C.C. No. 39	Transmittal Nos. 480 and 506
Ameritech Operating Companies Tariff F.C.C. No. 2	Transmittal Nos. 401 and 442

MEMORANDUM OPINION AND ORDER

Adopted: February 4, 1991; Released: February 28, 1991

By the Commission:

I. BACKGROUND

1. On November 15, 1989, the Common Carrier Bureau (Bureau) instituted an investigation into the lawfulness of rates for special access DS3 and DS3 equivalent services of Cincinnati Bell Telephone Company (CBT) and Southern New England Telephone Company (SNET).[1] The DS3 rates subject to investigation were formulated, at least in part, based on multiples of the carriers' DS1 rates. Such multiples are sometimes described as a "crossover". CBT's filing indicated that its DS3 rates were from 7 to 16 times greater than its DS1 rates, while SNET's DS3 rates varied from 6.8 to 11.6 times its DS1 rates, depending on the quantity of DS3 channels purchased and the duration of the service commitment.[2] The *Investigation Order* concluded that, although the general DS3 rates filed by CBT and SNET did not require rejection, those rates did raise sufficient questions to warrant investigation.

2. On February 2, 1990, the Bureau incorporated into the investigation in Docket 89-533 revisions to the DS3 Local Distribution Channel (LDC) rates of the Ameritech Operating Companies (Ameritech). [3] Ameritech said that its 1989 general DS3 rates were 6 to 9 times Ameritech's DS1 rates.[4] The *Ameritech Investigation Order* said that an investigation of Ameritech's general rates for the LDC portion of its DS3 service was warranted because the cost support materials submitted by Ameritech do not demonstrate that such a crossover ratio between DS1 and DS3 services will approximate costs. CBT, SNET, and Ameritech were ordered to keep account of all the earnings received pursuant to their respective DS3 rates which are subject to the Docket 89-533 investigation.[5]

3. The issues designated in the investigation generally seek to determine whether the DS3 rates of these carriers are reasonable. The *Designation Order* [6] assumed that the use of a crossover ratio between DS3 and DS1 rates might produce reasonable DS3 rates. Those carriers were accordingly directed to comment upon the reasonableness of crossover pricing, to supply information with respect to the cost relationships, if any, between DS1 and DS3 service, and to present evidence to support the specific crossover points each carrier used in establishing DS3 rates. Carriers were also invited to suggest alternative methodologies that could be used to establish DS3 rates, to demonstrate that the alternative methodology will ensure that DS3 rates reflect carrier costs, and to demonstrate that the DS3 rates that are subject to this investigation do reasonably approximate the costs of DS3 service.[7]

4. CBT, SNET, and Ameritech filed direct cases, several parties filed oppositions to the direct cases,[8] and Ameritech filed a reply to the oppositions. Subsequently, at the request of the Bureau, the carriers subject to this investigation submitted further cost information regarding their DS3 rates.[9] For the reasons stated below, we find in this Order that the DS3 rates in question are reasonable. Accordingly, we terminate the accounting orders and the investigation established in CC Docket No. 89-533.

II. PLEADINGS

A. Direct Cases

5. Ameritech, CBT, and SNET generally contend that a crossover between DS3 and DS1 is a reasonable means of establishing DS3 rates. *See, e.g.*, Ameritech Direct Case at 5; CBT Direct Case at 4-5; SNET Direct Case at 4. These carriers argue that a cost relationship exists between DS1 and DS3 service because, for example, 28 DS1 circuits can be multiplexed onto a single DS3 circuit and both DS1 and DS3 can share fiber facilities for transport and termination. Ameritech Direct Case at 5; CBT Direct Case at 6; SNET Direct Case at 6. The common characteristics and cross elasticities of DS3 and DS1, the parties assert, support the use of a DS3 to DS1 crossover to establish DS3 rates. Those carriers have divergent views regarding what the proper crossover and range of reasonableness should be. The suggested crossovers range from a low of 6 (for 12 Ameritech DS3s over 60 months) to a high of 15, which is the crossover ceiling advocated by SNET.

6. In addition to the crossover methodology, Ameritech, CBT, and SNET state that each used some form of unit cost or fully distributed cost (FDC) methodology in calculating rates. Those methodologies assertedly demonstrate that their DS3 rates are just and reasonable and also support the use of crossovers as a reasonable method of calculating DS3 rates. *See* CBT Direct Case at 7; Ameritech Direct Case at 3; SNET Direct Case at 3. Ameritech argues that the general rate for its DS3 package is reasonable because that rate closely approximates fully distributed costs. Ameritech Direct Case at 3. However, Ameritech claims that only the LDC rate element is subject to this investigation, and application of FDC principles to a subelement is an economically inappropriate way to evaluate total price. *Id.*

7. Ameritech suggests that this Commission adopt a "price floor" for DS3 rates, below which regulated carriers could not price DS3 service without adequate justification. Ameritech believes that a price floor ratemaking methodology would protect customers and competition and therefore be appropriate. *Id.* at 8. Ameritech claims that the implementation of a price floor for DS3 rates is justified because vendors of high capacity service competitive with local exchange carrier (LEC) high capacity services are entering the market at a rapid pace and consumer demand for these services is increasing. *Id.* at 7. Ameritech asserts that the price floor should be equal to the long-run average variable cost of DS3 service *Id.* at 8. CBT and SNET do not advocate any alternative methodology that could be used for establishing DS3 rates.

B. Oppositions

8. Opposing parties generally challenge the crossover methodology used by CBT, SNET, and Ameritech, alleging that a fully distributed cost allocation or some other allocation method would better ensure cost-based rates. *See, e.g.*, Ad Hoc Opposition at 11; ALTS Opposition at 5; MCI Opposition at 6; MFS Opposition at 19, 23, 25. The LECs' direct cases, the oppositions assert, do not provide enough information to demonstrate that the carriers' rates are cost-based. Opposing parties further assert that the costs underlying DS3 and DS1 service vary widely, which illustrates the inconsistency of any cost relationship between the two services. The lack of any cost relationship is underscored because DS1 and DS3 service utilize different central office equipment that requires different levels of maintenance, and DS3 is an exclusively fiber optic-based service while DS1 is carried over a mix of fiber and copper cables. *See, e.g.*, MFS Opposition at 7-9. Accurate pricing and costing of the subelements of LEC special access is necessary, according to the opposing parties, to promote effective competition and restrain anticompetitive activity. *See, e.g.*, ALTS Opposition at 5; MFS Opposition at 11-19.

9. SWB claims that crossover ratios are not appropriate for SWB because the basic pricing of DS1 and DS3 services is different. According to SWB, rates vary with the factors of time, distance, and quantity, which preclude any meaningful comparisons of the two offerings. SWB Opposition at 2. Moreover, SWB states that a "price floor" for SWB DS3 prices is inappropriate because such a requirement would restrict pricing flexibility, preventing SWB from effectively competing in some cases. *Id.* at 6. SWB maintains that it should be unrestrained in its pricing of DS3 service, as are the alternative access providers that compete with SWB for DS3 business. *Id.* at 7.

10. WTG contends that crossover points between DS1 and DS3 may be a reasonable method for determining DS3 rates. However, WTG claims that none of the carriers has provided credible cost data or other evidence to support the crossover points those carriers used. WTG Opposition at 1. WTG asserts that the "zone of reasonableness" established for voice grade to DS1 crossovers should apply to DS1 to DS3 crossovers, or alternatively, LECs should be required to demonstrate that the rates are cost-based. *Id.* at 2. The high ratios between the LECs' DS1 and DS3 rates, WTG argues, reflect strategic pricing by the LECs. *Id.* at 3.

C. Reply

11. In reply, Ameritech reiterates its position that its DS3 rates are just and reasonable under an FDC analysis or a crossover analysis.[10] Ameritech Reply at 4-13. Ameritech asserts that requests by opposing parties for the filing of additional detailed cost analysis and information for special access rates have been rejected by the Commission, and the Commission has determined that we will not prescribe a particular cost allocation methodology for special access subelement rates. *Id.* at 13. Ameritech further asserts that the Commission has rejected the position that the Communications Act requires that all rates for all services be based solely on FDC. *Id.* Ameritech maintains that the opposing parties have failed to demonstrate that Ameritech's DS3 LDC rates are unjust or unreasonable. *Id.* at 14. Therefore, contends Ameritech, the Commission should find Ameritech's rates just and reasonable and terminate this investigation without further action. *Id.* at 15.

III. SUPPLEMENTAL DATA

12. Subsequent to the filing of pleadings in this investigation, the the Bureau directed CBT, SNET, and Ameritech to submit detailed information regarding: (1) investment associated with each DS3 rate element; (2) fully distributed costs for the DS3 recurring rate elements; (3) demand forecasts for the 1990 tariff year; (4) fully distributed DS3 nonrecurring costs; and (5) baseline rates and optional payment plans with discounted rates for DS3 services.[11]

13. In response to the Bureau's request, Ameritech provided explanations and 1990 data in support of current 1990 rates for its LDC rates only. CBT and SNET provided the requested information for the channel termination, fixed mileage, and per mile rate elements. CBT provided this information in support of its 1990 rates, while SNET supported its 1989 rates.[12]

14. For its recurring LDC costs, Ameritech explained that its unit costs were developed by applying unit cost factors to installed unit investments in electronics and fiber facilities associated with the LDC,[13] then dividing the result by the number of anticipated LDCs. Since the unit costs reflect only the direct costs attributable to providing the service, Ameritech made an adjustment to include other costs that are not directly assignable. Ameritech applied a fully distributed cost factor (FDC) to the unit costs included in each rate element.[14]

15. Because of significant differences in investment and costs for providing DS3 service to various customers, CBT determined the investment and costs, including overheads, associated with providing DS3 service to each of its current and forecasted DS3 customers, then calculated a weighted average cost for each rate element. CBT included capital costs and operating expenses in each rate element by applying an annual charge factor (ACF) to the average costs included in each rate element.

16. SNET, in response to the Bureau's request, provided explanations and worksheets showing the investment required for each of the DS3 rate elements, the unit costs, the overhead loadings associated with the unit costs and the resulting DS3 rates for 1989.

IV. DISCUSSION

17. The Bureau initiated the investigation into the DS3 rates of CBT, SNET, and Ameritech because the carriers stated that they relied, at least in part, on multiples of their DS1 rates, rather than actual costs, to establish rates for DS3 service. The level of detailed explanation and additional data received from the carriers during the course of this investigation ultimately provided sufficiently disaggregated costs and projected demand which make the cost of each carrier's DS3 service discernible. Our examination of this data leads us to conclude that the carriers' DS3 rates are just and reasonable.[15]

18. In particular, we find that the CBT and Ameritech rates for 1989, and SNET's 1990 DS3 rates, are reasonable based on the current record considered in conjunction with related tariff filings. Since SNET has demonstrated that its 1989 rates are cost justified and the 1990 rates do not differ significantly from the 1989 rates,[16] we conclude that SNET's DS3 rates are reasonable.

19. The data filed with Ameritech's 1990 annual access filing on April 2, 1990, less than two months after Ameritech's 1989 LDC rates became effective, combined with the data Ameritech submitted in response to the Bureau's request in this investigation, sufficiently support the 1990 LDC portion of Ameritech's DS3 rates. Those rates are essentially the same as the LDC portion of Ameritech's 1989 DS3 rates.[17] Further, for 1989 ratemaking purposes, Ameritech determined historical costs and demand from existing DS3 individual case basis rates and from that historical base made projections regarding future demand and costs. Ameritech does not appear to have relied solely on a crossover methodology in its 1989 ratemaking process, and the rates it established in 1989 are consistent with Ameritech's fully cost-supported 1990 rates. Under these circumstances, we conclude that the LDC portion of Ameritech's 1989 DS3 rates are reasonable.

20. Similarly, CBT's 1989 DS3 rates did not differ significantly from its 1990 DS3 rates. CBT originally filed DS3 rates which became effective on November 17, 1989.[18] In that filing, CBT projected demand for only four DS3s for October through December 1989, with revenues of approximately $10,000 per month. While CBT provided no cost support and apparently relied on crossover methodology in establishing its 1989 DS3 rates, we find that these 1989 rates are consistent with the rates CBT filed in its 1990 annual access filing, which were justified on the basis of relevant costs.

V. CONCLUSION; ORDERING CLAUSES

21. In sum, we conclude that the DS3 rates subject to this investigation are just and reasonable. Accordingly, IT IS ORDERED that the investigation initiated in CC Docket No. 89-533, Cincinnati Bell Telephone Companies Tariff F.C.C. No. 35, Transmittal Nos. 535 and 564, Southern New England Telephone Company Tariff F.C.C. No. 39, Transmittal Nos. 480 and 506, and Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal Nos. 401 and 442 IS TERMINATED.

22. IT IS FURTHER ORDERED that the accounting orders initiated in CC Docket No. 89-533, Cincinnati Bell Telephone Companies Tariff F.C.C. No. 35, Transmittal Nos. 535 and 564, Southern New England Telephone Company Tariff F.C.C. No. 39, Transmittal Nos. 480 and 506, and Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal Nos. 401 and 442 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* Cincinnati Bell Telephone Company, *et al.*, CC Docket No. 89-533, 4 FCC Rcd 8621 (Com.Car.Bur. 1989) (*Investigation Order*).

[2] In its direct case, CBT calculates crossovers between DS3 and DS1 rates using average DS1 circuit length rates. This calculation reveals a crossover range of 9.1 to 10.8 for its 1989 rates, and a range of 8.2 to 14.6 for its 1990 rates. CBT also calculates DS3 to DS1 crossovers utilizing average mileage for actual DS3 circuits, which results in ranges of 8.1 to 9.8, and 8.2 to 14.2 for 1989 and 1990 rates, respectively. *See* CBT Direct Case Exhibit 3 and Supplement to Direct Case Exhibit 3A, filed May 17, 1990. SNET, while maintaining its original rate crossover, states that the cost crossover between SNET's DS3 and DS1 service is 15 to 1. *See* SNET Direct Case at 5.

[3] *See* Ameritech Operating Companies, 5 FCC Rcd 854, 855 (Com.Car.Bur. 1990) (*Ameritech Investigation Order*).

[4] In its direct case, Ameritech claims that the crossovers from DS1 to DS3 service packages range from 6 to 19 for cost crossovers, while price crossovers range from 6 to 12. *See* Ameritech Erratum at 1, filed May 15, 1990.

[5] In addition to the DS3 rates of CBT, SNET, and Ameritech which were the focus of the Order designating issues for investigation, the revised DS3 rates these carriers filed in their 1990 access filings were incorporated into this investigation. *See* Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, 5 FCC Rcd 4177, 4231 (Com.Car.Bur. 1990).

[6] Cincinnati Bell Telephone Co., *et al.*, CC Docket 89-533, Order Designating Issues for Investigation, 5 FCC Rcd 1825 (Com.Car.Bur. 1990) (*Designation Order*).

[7] *Designation Order*, 5 FCC Rcd at 1826.

[8] Parties filing oppositions are: Ad Hoc Telecommunications Users Committee; American Petroleum Institute; Association for Local Telecommunications Services; American Telephone and Telegraph Company; MCI Telecommunications Corporation; Metropolitan Fiber Systems, Inc.; Southwestern Bell Telephone Company; and Williams Telecommunications Group, Inc.

[9] *See* Letters from Chief, Tariff Division, Common Carrier Bureau, dated Sept. 21, 1990 to: W.F. Werwaiss, Southern New England Telephone Co.; B.J. Stonebraker, Cincinnati Bell Telephone Co.; and J.C. Litchfield, Ameritech Services, Inc.

[10] Ameritech was the only carrier to reply to the oppositions filed against the direct cases in CC Docket No. 89-533.

[11] *See* note 8, *supra*.

[12] *See* letters from: B.J. Stonebraker, Cincinnati Bell Telephone Co.; W.F. Weirwaiss, Southern New England Telephone Co.; and J.C. Litchfield, Ameritech Services, Inc., dated Oct. 5, 1990, to Secretary, Federal Communications Commission.

[13] Unit investments include material, engineering and installation, common equipment, installed costs for fiber facilities, and spare plug-in costs. The unit cost factor includes capital costs and relevant expenses.

[14] Ameritech explains that it develops its FDC factor by calculating the ratio of revenue requirement (less miscellaneous and nonrecurring revenues) to total annualized directly assigned recurring costs.

[15] Indeed, it is notable that none of the parties objecting to the rates has challenged the adequacy of the carriers' supplemental cost showing.

[16] We note that in 1990 SNET reduced its channel termination rate by 15 percent, the fixed channel mileage rate by 7 percent and the per mile channel mileage rate by 10 percent. We also note that SNET, in response to lower demand and reduced revenue requirements, reduced special access rates by 9.6 percent for 1990.

[17] Ameritech's LDC rates were reduced between 1989 and 1990 as follows: Illinois -- 5 percent; Indiana and Michigan -- 4 percent; Ohio -- 7 percent; Wisconsin -- 11 percent. The average LDC rate reduction for all the Ameritech companies was approximately 6 percent, including an approximate 1 percent reduction ordered by the Bureau for the special access element.

[18] *See* Cincinnati Bell Telephone Transmittal No. 535, dated Aug. 18, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-95

In the Matter of

Amendment of Section 73.202(b), RM-6569
Table of Allotments,
FM Broadcast Stations
(Churchville and Luray, Virginia)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 15, 1991; Released: February 28, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration filed by Commonwealth Audio Visual Enterprises, Inc. ("Commonwealth"), licensee of Station WLCC, Luray, Virginia, directed to the *Report and Order* in this proceeding, 5 FCC Rcd 1106 (1990). The *Report and Order* substituted Channel 292B1 for Channel 294A at Churchville, Virginia, and modified the construction permit of Station WBOP (formerly WJNA), Channel 294A, Churchville, Virginia, to specify operation on Channel 292B1. In order to accommodate this upgrade, it was also necessary to substitute Channel 289A for Channel 292A at Luray, Virginia, and modify the license of Station WLCC, Channel 292A, Luray, Virginia, to specify operation on Channel 289A. Peter W. Lechman ("Lechman") filed an Opposition to the Petition for Reconsideration.[1] For the reasons discussed below, we deny the Petition for Reconsideration.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Lechman proposing the substitution of Channel 292B1 for Channel 294A at Churchville, Virginia, and modification of his construction permit to specify operation on Channel 292B1. To accommodate this upgrade, Lechman proposed the substitution of Channel 289A for Channel 292A at Luray, and modification of the Station WLCC license to specify operation on Channel 289A. Thereafter, we issued the *Notice of Proposed Rule Making and Order to Show Cause* in this proceeding, 4 FCC Rcd 3903 (1989). In response to the *Order to Show Cause* directed against its license, Commonwealth argued that the proposed upgrade of an unbuilt station would "truly be of marginal value," and, in any event, would be outweighed by the potential disruption to the Station WLCC listening audience resulting from the proposed channel substitution. In the alternative, Commonwealth contended that Lechman should be required to demonstrate his financial qualifications to meet his reimbursement requirement. In addition, Commonwealth further argued that it should receive at least six months notice prior to effectuating the channel change in order to minimize any audience loss.

3. In the *Report and Order*, we determined that Commonwealth had not raised a substantial and material question of fact requiring a hearing on the proposed modification of its license. We also concluded that an expanded FM service to Churchville, Virginia, would serve the public interest. Consistent with normal Commission procedures, Lechman was required to reimburse Commonwealth for the legitimate and prudent costs of changing the channel of Station WLCC. We found that Commonwealth had raised no facts concerning the ability of Lechman to meet this reimbursement requirement. Finally, we stated that Commonwealth need not be afforded six months prior notice before changing its channel, as Commonwealth would be afforded a significant period of advance notice concerning the channel change.

THE PLEADINGS

4. In support of its Petition for Reconsideration, Commonwealth again argues that it would not be in the public interest to disrupt the listening habits of its audience in order to provide the "marginal" benefit of expanding the future service area of an unbuilt station. Commonwealth also argues that the *Report and Order* improperly placed the burden on Commonwealth to demonstrate that the proposed upgrade would not serve the public interest. In addition, Commonwealth argues that "assuming *arguendo*" that the upgrade is in the public interest, the *Report and Order* erred by permitting Station WBOP to commence program tests without first resolving the issue of the amount of reimbursement and submitting payment to Commonwealth, citing *Harold H. Jahnke*, 46 R.R. 2d 659, 660 n.2 (1979), and *Obed S. Borgen*, 58 FCC 2d 560, 564 (1976). In his Opposition, Lechman contends that increasing the service of a station is "inherently" in the public interest. With respect to conditioning the Station WBOP upgrade authorization by withholding program test authority until a reimbursement settlement is reached, Lechman argues that Commonwealth should not be in a position to delay implementation of the upgrade by merely not agreeing to a reimbursement amount.

DISCUSSION

5. We deny the Petition for Reconsideration. We continue to believe that expanding the future service area of Station WBOP is in the public interest.[2] We recognize that changing the channel of an existing station creates a potential for a temporary disruption to the listening habits of a station's audience. This does not override the public interest benefit of providing service to additional population. In this regard, we note that Commonwealth is entitled to reimbursement for the advertising and promotional costs of apprising the public of the change in channel. There is nothing in the record in this proceeding to suggest that Commonwealth will not be able to adequately inform the residents of Luray (with a population of approximately 3,584 persons) and the surrounding area of the change in channel of a Class A FM station. Moreover, we continue to believe that six months prior notice to Commonwealth of the change in channel is unnecessary. Under Commission policy, Commonwealth will be afforded a significant period of time before it is required

to change the channel of Station WLCC. As we noted in the *Report and Order*, "it is generally not necessary for the change to take place until utilization of the existing frequency actually prevents a newly authorized station from inaugurating service." *See Albany, Buffalo, Ilion and Utica, New York, and Boston, Massachusetts*, 2 FCC Rcd 4300 (1987) and *Broken Arrow and Bixby, Oklahoma, and Coffeyville, Kansas*, 4 FCC Rcd 6981 (1989). Commonwealth has offered no evidence in its Petition for Reconsideration to the contrary.

6. In order to achieve the public interest benefit of expanding the service area of Station WBOP, it was necessary to modify the license of Station WLCC. We did not impose an improper burden on Commonwealth to demonstrate that the upgrade would not serve the public interest. We modified the Station WLCC license in accordance with Section 1.87 of the Commission's Rules and Section 316 of the Communications Act. [3] Consistent with these procedures, we issued an *Order to Show Cause* to Commonwealth advising it of the proposed changes and the resulting public interest benefit of expanding the service area of Station WBOP. At that juncture, Commonwealth was afforded the opportunity to submit a written showing, "with particularity," why its Station WLCC license should not be modified. Upon review of the written submission, we are then permitted to either grant or deny the proposed modification. In the event that Commonwealth had raised a substantial and material question of fact concerning either the proposed upgrade or its license modification, we would have designated this matter for hearing. As discussed in the preceding paragraph, Commonwealth did not raise any substantial and material question of fact or rebut our tentative conclusion that the proposed upgrade at Churchville and attendant license modification at Luray would serve the public interest.

7. In the present situation, we do not believe that it is necessary to impose a condition on the Station WBOP upgrade withholding program test authority until a final agreement is reached on the amount of reimbursement. Our experience indicates that parties generally enter into good faith negotiations and resolve the amount of reimbursement well before a station actually changes channel. There is nothing in the record in this proceeding to suggest that Lechman would not proceed in good faith to meet his reimbursement requirement or otherwise indicate a need to impose such a condition. A procedure of routinely imposing such a condition on rule making authorizations, either for new allotments or upgrades, would be unnecessary and burdensome to the parties and the Commission, and could delay the initiation of expanded service to the public.

8. Although Commonwealth relies upon *Obed S. Borgen et al.* and *Harold H. Janke, supra*, for the proposition that the Commission has imposed a similar condition in order to avoid hardship to a station changing its channel, we do not believe these cases are controlling on the instant situation. First, these two decisions -- which involve the same parties and proceeding -- are in a different procedural posture than the present case. Both *Borgen and Jahnke* involved a condition that was imposed by the Commission while passing upon a settlement agreement between two applicants for a construction permit for a new station and later ruling upon a request for extension of the construction permit. They did not entail imposing such a condition in a rule making proceeding alloting new FM channels that necessitated an existing station to change its channel. Second, the facts that may have warranted a condition in the *Borgen* and *Jahnke* proceeding do not exist here. In *Borgen*, Station KCHA, Charles City, Iowa, was required as a result of a rule making proceeding allotting FM channels to Pella and Hampton, Iowa, to change from Channel 285A to Channel 240A. The licensee had not gone forward with the required channel change without a resolution of the reimbursement amount and an unequivocal statement from the Hampton permittee that he would meet his *pro rata* share of the reimbursement requirement. The permittee of the Hampton station had budgeted $2,000 to reimburse Station KCHA for the cost of changing its channel, whereas Station KCHA had claimed that its reasonable costs to change channels would be approximatley $10,000. As observed in that case, the typical cost of such a change, based on prior decisions, was approximately $3,000. With respect to good faith negotiations between the parties to arrive at a final amount, the Hampton permittee characterized the negotiation efforts of Station KCHA as an attempt "to extort such sum as ransom," and referred to a reimbursable legal expense as "unacceptable for negotiation." In contrast, Lechman has made an unequivocal commitment to reimburse Commonwealth, has offered to establish a $10,000 escrow account for the reimbursement, and has stated his willingness to pay any legitimate and prudent costs in excess of $10,000. In light of the above, we believe that the factual background of this case is distinguishable from the *Borgen* case, and does not warrant departure from our practice of not routinely imposing such a condition.

9. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Commonwealth Audio Visual Enterprises, Inc. IS DENIED.

10. IT IS FURTHER ORDERED, That the Motion for Stay filed by Commonwealth Audio Visual Enterprises, Inc. IS DISMISSED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Commonwealth also filed a Motion for Stay directed to the *Report and Order* in this proceeding. Under Section 1.420(f) of the Commission's Rules, the filing of a Petition for Reconsideration automatically stays the effectiveness of the *Report and Order*. Accordingly, the Motion for Stay will be dismissed without further consideration.

[2] A Commission engineering analysis indicates that the upgrade of Station WBOP would enable it to serve 86,878 more persons as a Class B1 station than it could as a Class A station.

[3] *See Modification of FM and Television Licenses Pursuant to Section 316 of the Communications Act*, 2 FCC Rcd 3327 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-46

In the Matter of

Amendment of Section 73.202(b), RM-7604
Table of Allotments,
FM Broadcast Stations.
(Mount Sterling, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 19, 1991; Released: February 28, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Brown County Broadcasting ("petitioner") requesting the allotment of Channel 294B1 to Mount Sterling, Illinois, as the community's first local FM service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by this proposal since it could provide Mount Sterling with its first local FM channel. A Commission engineering analysis has determined that Channel 294B1 can be allotted to Mount Sterling in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.4 kilometers (8.9 miles) southwest of the community.[1] The site restriction is necessary in order to avoid short-spacings to a construction permit for Station WKBQ(FM), Channel 293C1, Granite City, Illinois, and the licensed site of Station WSWT(FM), Channel 295B, Peoria, Illinois.

3. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Mount Sterling, Illinois	--	294B1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 22, 1991,** and reply comments on or before **May 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary S. Smithwick
Smithwick & Belendiuk, P.C.
2033 M Street, N.W., Suite 207
Washington, D.C. 20036
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The proposed coordinates for this allotment are North Latitude 39-57-22 and West Longitude 90-55-11.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-45

In the Matter of

Amendment of Section 73.202(b), RM-7608
Table of Allotments,
FM Broadcast Stations.
(Lanai City, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 19, 1991; Released: February 28, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Ivan N. Dixon, III, permittee of Channel 284A, Lanai City, Hawaii, requesting the substitution of Channel 284C for Channel 284A at Lanai City, Hawaii, and modification of his construction permit (BPH-890503MQ) to specify operation on the higher class channel. Petitioner states his intention to apply for the channel, if allotted.

2. We believe the petitioner's proposal warrants consideration since it could provide a wide coverage area FM station to Lanai City. An engineering analysis has determined that Channel 284C can be substituted for Channel 284A at Lanai City in compliance with the Commission's minimum distance separation requirements at the site specified in the construction permit, with a site restriction of 6.2 kilometers (3.8 miles) southeast of the community.[1] We shall also propose to modify petitioner's construction permit to specify operation on Channel 284C in lieu of Channel 284A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher class channel at Lanai City or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. In view of the above, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Lanai City, Hawaii	284A	284C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 22, 1991,** and reply comments on or before **May 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary S. Smithwick
Smithwick & Belendiuk, P.C.
2033 M Street, N.W.
Suite 207
Washington, D.C. 20036
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 284C at Lanai City are North Latitude 20-48-23 and West Longitude 156-52-01.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-44

In the Matter of

Amendment of Section 73.202(b), RM-7619
Table of Allotments,
FM Broadcast Stations.
(Warrenton, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 19, 1991; Released: February 28, 1991

By the Acting Chief, Allocations Branch:

1. A petition for rule making has been filed by Kaspar Broadcasting Company of Missouri ("petitioner") seeking the substitution of FM Channel 260C3 for Channel 260A at Warrenton, Missouri. Petitioner also requests modification of its construction permit for Station KFAV(FM) to specify Channel 260C3 in lieu of Channel 260A. Petitioner submitted information in support of the proposal and stated its intention to file an application for the new channel, if allotted.

2. We believe petitioner's proposal warrants consideration, as it could provide a wide coverage area FM service to Warrenton, Missouri. Channel 260C3 can be allotted to Warrenton, Missouri, at petitioner's specified site, in compliance with the Commission's spacing requirements.[1] The grant of a license for Channel 260C3 at Warrenton may, however, be contingent on the licensing of Station KJMO, Channel 261A, Jefferson City, Missouri, on Channel 261C2, and Station KLRK, Channel 261A, Vandalia, Missouri, on Channel 282A.[2] We shall propose to modify the construction permit for Station KFAV(FM), Channel 260A, to specify operation on Channel 260C3 in accordance with Section 1.420(g) of the Commission's Rules. Therefore, we shall not accept competing expressions of interest or require petitioner to demonstrate the availability of an additional equivalent channel for use by interested parties.

3. Based on the above discussion, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Warrenton, Missouri	260A	260C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this order to the following:

Triple-D
Properties, Inc.
Station KJMO
3109 South Ten Mile Dr.
Jefferson City,
Missouri 65109

Webb Communications
Station KLRK
3800 Crystal Lane
Inverness, Florida 32650

6. Interested parties may file comments on or before **April 22, 1991,** and reply comments on or before **May 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John R. Wilner
Bryan, Cave, McPheeters & McRoberts
700 Thirteenth Street, N.W., Suite 700
Washington, D.C. 20005-3960
(Counsel for the petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 260C3 are 38-54-00 and 91-08-00.

[2] *See Report and Order* in MM Docket No. 87-294, 4 FCC Rcd 4038 (1989). The licensees of Stations KJMO and KLRK will be served with copies of this *Notice.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-43

In the Matter of

Amendment of Section 73.202(b), RM-7607
Table of Allotments,
FM Broadcast Stations.
(Portageville and New Madrid,
Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 19, 1991; Released: February 28, 1991

By the Acting Chief, Allocations Branch:

1. New Madrid County Broadcasting Company ("petitioner"), licensee of Station KMIS-FM, Channel 292A, Portageville, Missouri, has filed a petition for rule making requesting the change of the community of license for Channel 292A from Portageville to New Madrid, Missouri, the substitution of Channel 293C2 for Channel 292A, and the modification of the license for Channel 292A to specify operation on Channel 293C2 at New Madrid. Petitioner submits information in support of its proposal and states its intention to apply for the channel, if allotted.

2. We believe the proposal warrants consideration. The proposal could provide New Madrid (population 3,204)[1] with its first local aural transmission service while local aural transmission service at Portageville (population 3,470) would continue to be provided by petitioner's Station KMIS-AM. This proposal is mutually exclusive with the present allotment of Channel 292A at Portageville since the two communities are separated by less than the required 106 kilometers (68.9 miles) for Class A and C2 first adjacent channel allotments.

3. Channel 293C2 can be substituted for Channel 292A and allotted to New Madrid from Portageville, Missouri, in compliance with the Commission's minimum distance separation requirements at the current transmitter site for Station KMIS-FM.[2] As requested, we shall propose to modify the license for Station KMIS-FM, Channel 292A, to specify operation on Channel 293C2 at New Madrid in accordance with Sections 1.420(g) and (i) of the Commission's Rules. We shall not accept competing expressions of interest in the use of Channel 293C2 at New Madrid or require the petitioner to demonstrate the availability of an additional equivalent class channel at New Madrid.

4. In view of the fact that New Madrid, Missouri, could receive its first local aural transmission service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
New Madrid, Missouri	---	293C2
Portageville, Missouri	292A	---

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **April 22, 1991,** and reply comments on or before **May 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John J. McVeigh
Francisco R. Montero
Fisher, Wayland, Cooper
and Leader
1255 23rd Street, N.W., Suite 800
Washington, D.C. 20037
(Counsel for the petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures are taken from the 1980 U.S. Census.

[2] The coordinates for Channel 293C2 at New Madrid are 36-25-30 and 89-41-39.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-42

In the Matter of

Amendment of Section 73.202(b), RM-7616
Table of Allotments,
FM Broadcast Stations.
(Eldon, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 19, 1991; Released: February 28, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Rivertown Communications Company ("petitioner") requesting the allotment of Channel 282C3 to Eldon, Iowa, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 282C3 to Eldon, Iowa, since it could provide the community with its first local FM service. Channel 282C3 can be allotted to Eldon in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.6 kilometers (4.7 miles) south to avoid a short-spacing to Station KTOF, Channel 283C1, Cedar Rapids, Iowa.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Eldon, Iowa	--	282C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 22, 1991,** and reply comments on or before **May 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David W. Brown
Rivertown Communications Company
P.O. Box 65
Eldon, Iowa 52554
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 282C3 at Eldon, Iowa, are North Latitude 40-51-15 and West Longitude 92-15-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-41

In the Matter of

Amendment of Section 73.202(b), RM-7227
Table of Allotments,
FM Broadcast Stations.
(Lady's Island and Ridgeland,
South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 19, 1991; Released: February 28, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed jointly by R. Geoffrey Levy, Trustee in Bankruptcy for Empire Broadcasting Corp., licensee of Station WSHG (formerly WZBZ(FM)), Channel 285A, Ridgeland, South Carolina, and Mattox-Guest of South Carolina, Inc., proposed assignee of Station WSHG ("petitioner").[1] Petitioner requests the substitution of Channel 285C3 for Channel 285A and the modification of Station WSHG's license to specify Lady's Island, South Carolina, as its community of license.

2. Petitioner states that the request complies with the dictates of the Commission's ruling in *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989) ("*Community of License R&O*"), *recon. granted in part*, 5 FCC Rcd 7094 (1990) ("*Community of License MO&O*"), in that the reallotment and upgrading of Station WSHG will result in a preferential allotment of channels by providing a net service benefit for the affected communities. Ridgeland, in Jasper County, has a 1980 U.S. Census population of 1,143 persons. Lady's Island, in Beaufort County, has a 1980 population of 3,120 persons, according to a Division of Research and Statistical Services, State Budget and Control Board, South Carolina State Data Center Report dated July, 1987. Further, petitioner states that Beaufort County, which would be within the 60 dBu contour of the Lady's Island station, is expected to grow in population from 65,364 persons in 1980 to approximately 104,900 persons in 1990, and to 219,000 persons by 2010. Jasper County, in which Ridgeland is located, is expected to increase in population by only 10,000 persons, according to the petitioner. Therefore, while petitioner believes that there will be little short-term public interest benefit from the relocation of Station WSHG because the increase in population served at this time is minimal, it contends that the long term benefits will be substantial.

3. Petitioner recognizes that Lady's Island is neither incorporated nor listed in the U.S. Census. However, it submits that Lady's Island is a community for allotment purposes. To this end, petitioner states that Lady's Island has two public schools, the Lady's Island Elementary School, with 456 students, and Lady's Island Middle School, with 843 students, as well as the Beaufort Academy. Further, it states that a review of the Beaufort Telephone Book and advertisements in the Beaufort Gazette indicates that over 50 businesses and professional offices are located on Lady's Island. A number of the businesses incorporate Lady's Island into their names, such as Lady's Island Auto & Hardware, Lady's Island Marina, and Lady's Island Shopping Center. In addition, Lady's Island is served by the Lady's Island Volunteer Fire Department and Lady's Island-St. Helena Fire Station, several churches, and a number of restaurants.

4. After a careful review of the petition, we are unable to tentatively conclude that the modification of Station WSHG's license from Ridgeland to Lady's Island would serve the public interest. Section 1.420(i) permits a station to change its community of license where (1) the new allotment is mutually exclusive with the existing allotment, (2) the allotment to the new community better serves the Commission's allotment priorities and policies than maintaining the allotment at the existing community, and (3) the change does not deprive a community of its sole existing broadcasting station. In this case, the use of Channel 285C3 at Lady's Island is mutually exclusive with Channel 285A at Ridgeland as the communities are located only 27 kilometers (16.8 miles) apart whereas the Commission's rules require a minimum separation of 142 kilometers (188.2 miles) for co-channel Class A and C3 allotments. Further, the change in community could allow Station WSHG to increase its service area, thus furthering the efficient use of the spectrum. We recognize that Station WSHG cannot upgrade to Channel 285C3 at Ridgeland because it would be short-spaced to Station WHCG, Channel 285A, Metter, Georgia.

5. We question whether the modification of Station WSHG's license to specify Lady's Island will result in deletion of Ridgeland's only local broadcast service. Station WCOG(AM) is licensed to Ridgeland and co-owned with Station WSHG.[2] However, Station WCOG(AM) is presently off the air and has been since April, 1989. Thus, Station WSHG is the community's only local broadcast station. Petitioner states that it "proposes to take prompt action to return the station to service once the proposed assignment is consummated." Therefore, unless Station WCOG(AM) is on the air at the time this request is ripe for decision, the reallotment of Channel 285A from Ridgeland to Lady's Island would result in the removal of Ridgeland's only existing local broadcast service. [3]

6. We are also unable to determine that Lady's Island is a community for allotment purposes. As the Commission has previously stated, the principal test of community status is whether the residents function as and conceive of themselves as a community around which their interests coalesce. *See Vimville, Mississippi*, 55 R.R. 2d 256 (1983). We agree with the petitioner that the fact that Lady's Island is not incorporated or listed in the 1980 U.S. Census does not automatically bar it from being found to be a community for allotment purposes. Petitioner has provided information as to the residential population and business complexion of Lady's Island. However, it appears that there is no local government, with either Beaufort County or the State of South Carolina providing Lady's Island with the various types of municipal services normally provided by a community, such as water and sewer, library facilities, and recreational facilities. There is no

separate Lady's Island telephone book or separate listing in the Beaufort telephone book for either the residences or businesses which are located in Lady's Island. The businesses located in Lady's Island advertise in the Beaufort Gazette, as there is no local newspaper. Apart from a business club and garden club, Lady's Island has no civic organizations, such as a Chamber of Commerce, Lions Club or Rotary Club, which identify with the location, or community center. There is no Lady's Island post office with a separate zip code. Lady's Island abuts the larger community of Beaufort, South Carolina, and the information provided leads us to believe that Lady's Island is not a separate community, with distinct interests and needs, but is instead a populated area reflecting the growth of Beaufort beyond its corporate limits. Therefore, petitioner is requested to provide further information to assist us in determining whether Lady's Island is a community for allotment purposes. Petitioner should also address the question of whether, disregarding the existence of Station WSHG's present operation at Ridgeland, we would prefer a request for the allotment of Channel 285C3 to Lady's Island as a first local service over a request for the allotment of Channel 285A at Ridgeland as a first local fulltime aural service. Petitioner should submit information concerning public interest factors normally considered under our allotment priorities such as the relative location of Ridgeland and Lady's Island, city size and the availability of reception services.

7. Channel 285C3 can be allotted to Lady's Island in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.4 kilometers (7.1 miles) southeast to avoid a short-spacing to Station WHCG, Channel 285A, Metter, Georgia.[4] As requested, we also propose to modify the license of Station WSHG to specify Lady's Island as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 285C3 at Lady's Island or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

8. We believe the public interest would be served by soliciting further comment on the proposal to substitute Channel 285C3 for Channel 285A and to modify Station WSHG's license to specify Lady's Island in lieu of Ridgeland as its community of license. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Lady's Island, South Carolina	--	285C3
Ridgeland, South Carolina	285A	--

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **April 22, 1991,** and reply comments on or before **May 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Howard J. Barr, Esq.
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006
(Counsel to petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Pursuant to the Commission grant of the application for assignment of license on March 5, 1990, Mattox-Guest is now the licensee of FM Station WSHG and WCOG(AM), both licensed to Ridgeland. We will thus treat Mattox-Guest as the sole petitioner in this proceeding.

[2] On March 5, 1990, the Commission granted Mattox-Guest's assignment of license application for Station WCOG(AM).

[3] *See Community of License MO&O, supra.*

[4] The coordinates for Channel 285C3 at Lady's Island are North Latitude 32-23-57 and West Longitude 80-32-03.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-526

In the Matter of

Amendment of Section 73.202(b), RM-7422
Table of Allotments,
FM Broadcast Stations.
(Eagle, Idaho)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 31, 1991; Released: March 1, 1991

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of Cynthia Anne Siragusa ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6588 (1990), proposing the allotment of Channel 300C2 to Eagle, Idaho, as that community's first local FM service. Petitioner filed comments restating her intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 300C2 to Eagle, Idaho, as that community's first local FM service. Channel 300C2 can be allotted to Eagle in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 15, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Eagle, Idaho	300C2

4. The window period for filing applications will open on **April 16, 1991,** and close on **May 16, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 300C2 at Eagle are North Latitude 43-41-42 and West Longitude 116-21-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-454

In the Matter of

Amendment of Section 73.202(b), RM-6839
Table of Allotments,
FM Broadcast Stations.
(El Dorado, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 14, 1991; Released: March 1, 1991

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 7540 (1989), issued in response to a petition filed by William J. Wynne ("petitioner"), permittee of Station KLTW(FM), Channel 227A, El Dorado, Arkansas, proposing the substitution of Channel 227C3 for Channel 227A and the modification of his permit accordingly. Petitioner filed comments in support of the proposal. No other comments were received.

2. Channel 227C3 can be allotted to El Dorado, Arkansas, at the petitioner's suggested site located 19 kilometers (11.8 miles) southwest of the community,[1] consistent with the minimum distance separation requirements of the Commission's Rules. The site restriction is required to avoid a short-spacing to Station KQID(FM), Channel 226C, Alexandria, Louisiana,[2] and to Station KBOK(FM), Channel 227A, Malvern, Arkansas.[3]

3. We believe the public interest would be served by substituting Channel 227C3 for Channel 227A at El Dorado, Arkansas, since it would provide an additional expanded coverage FM service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the permit of Station KLTW(FM) to specify operation on Channel 227C3, at El Dorado, as requested.[4]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 15, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
El Dorado, Arkansas	227C3, 241C1, 257A, 276A[5]

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit issued to William J. Wynne for Station KLTW(FM), El Dorado, Arkansas, IS MODIFIED effective **April 15, 1991,** to specify operation on Channel 227C3 in lieu of Channel 227A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates used for Channel 227C3 at El Dorado are 33-07-46 and 92-50-53. The site specified in the *Notice* was originally determined to conform with the minimum distance separation requirements because of misinformation in the Commission's records. In an addendum to his comments, petitioner suggested the site specified in this *Report and Order*.

[2] Coordinates at the licensed site of Station KQID(FM) are 31-38-20 and 92-12-18.

[3] Coordinates at the authorized site of Station KBOK(FM) are 34-22-25 and 92-49-52.

[4] Because the petition that resulted in this allotment was filed prior to October 2, 1989, Station KLTW(FM), El Dorado, may avail itself of the provisions of Section 73.213(c) of the Commission's Rules with respect to Station KBOK(FM), Channel 227A, Malvern, Arkansas, at coordinates 34-22-25 and 92-49-52. *See* 47 CFR § 73.213(c).

[5] Channel 277C1 has been proposed in MM Docket No. 89-85. *See* 4 FCC Rcd 3725 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-587

In the Matter of

Amendment of Section 73.202(b), RM-6602
Table of Allotments,
FM Broadcast Stations.
(Bisbee and Green Valley, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 14, 1991; Released: March 1, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 8751 (1989), proposing the substitution of Channel 221C2 for Channel 221A at Green Valley, Arizona, and modification of the license of Nova Communications, L.P. ("Nova") for Station KQYT(FM), Channel 221A, accordingly. The *Notice* also proposed the substitution of Channel 222A for Channel 221A at Bisbee, Arizona, and the modification of the license of Sierra-Pacific Broadcasting, Ltd. ("Sierra"),[1] for Station KZMK(FM), Channel 221A, Bisbee, in order to accommodate the Green Valley proposal. An *Order to Show Cause* was issued to Station KZMK(FM) directing the licensee to demonstrate why its license should not be modified to specify operation on Channel 222A in lieu of Channel 221A at Bisbee. The Green Valley proponent also requested the substitution of Channel 217C2 for Channel 219A at Tucson, Arizona, to accommodate its proposal in conformity with the minimum distance separation requirements of the Commission's Rules, and the modification of the license of the Foundation for Creative Broadcasting ("FCB") for Station KXCI(FM) accordingly.[2] The latter substitution would also require Station KXCI(FM) to relocate its transmitter. In response to the *Notice*, supporting comments were filed by Southwestern Wireless, Inc. ("Southwestern"), the former licensee of Station KQYT(FM). [3] FCB and Sierra also filed comments. Southwestern filed reply comments.

2. Recognizing the Commission's concern regarding noncommercial interference with TV Channel 6, Southwestern advised that FCB consented to the proposed substitution of Channel 217C2 for Channel 219A at Tucson, combined with the relocation of its transmitter site to accommodate the Green Valley proposal. This is based upon Southwestern's commitment to reimburse FCB's reasonable and prudent expenses associated therewith. In support of its proposal Southwestern stated that the proposed modification of Station KQYT(FM) at Green Valley would enable it to serve a greater area and population, while the relocation of Station KXCI(FM) would eliminate the potential for interference with Station KUAT-TV. Southwestern also provided information regarding the potential effect an upgrade on Channel 221 at Green Valley could have on noncommercial educational Channels 218, 219 and 220 within the KUAT-TV Channel 6 market. In accordance with the *First Report and Order* in MM Docket No. 86-144, 2 FCC Rcd 660 (1987), the *Notice* requested that Southwestern furnish a study showing the preclusive effect of the upgrade on the future availability of Class A, C3, C2, C1 and C noncommercial operations on those channels.

3. In response to the *Notice*, Southwestern submitted a preclusion study for the proposed operation of Station KQYT(FM) on Channel 221C2 assuming operation of Station KXCI(FM) on Channel 217C2 at Tucson, collocated at the site of Station KUAT-TV.[4] According to Southwestern, noncommercial availability would not be significantly affected if Channel 221C2 is allotted to Green Valley. Southwestern asserts that the Green Valley proposal would not preclude the use of any noncommercial educational channel that is not presently precluded by existing United States stations or by Mexican FM allotments. Moreover, Southwestern advises that the proposed modification of Station KQYT(FM) at Green Valley would provide the opportunity for a new noncommercial educational channel at Cochise, Arizona, and the modification of Station KXCI(FM) on Channel 217C2 at Tucson would provide the opportunity for a new service at Nogales.

4. In response to the *Order to Show Cause*, Sierra, while agreeing to accept a modification of the license for Station KZMK(FM) at Bisbee to accommodate the Green Valley proposal, nevertheless expressed a preference for a Class A channel other than Channel 222, based on its desire to increase its service area by increasing its power to 6 kW. Sierra stated that if no other channel is available to accomplish its goal, it would accept the proposed modification of its facilities as set forth in the *Notice*.

5. Although FCB supports Southwestern's proposal, it requested that the action be conditioned on the contingency specified in the *Notice*. The *Notice* stated that "the Green Valley proposal is contingent upon FCB filing an application and *receiving authority* to operate Station KXCI(FM) on Channel 217 at Tucson." (emphasis added)

6. Sierra's expressed preference to operate on a Class A channel which will comply with the minimum distance separation requirements for 6 kW operation is without merit in the context of this proceeding. This proposal was filed and processed pursuant to the provisions of Section 73.213(c) of the Commission's Rules (the "old" minimum distance separation requirements). *See Second Report and Order*, 4 FCC Rcd 6375 (1989). Thus, the proposed substitution of Channel 222A at Bisbee will remain unchanged. *See also Second Report and Order* (Angola *et al.*, IN), MM Docket No. 88-286, adopted February 6, 1991.

7. FCB's request to delay the outcome of this proceeding pending licensing authority for Station KXCI(FM) is no longer a concern. The issuance of a construction permit for Station KXCI(FM) (BPED-900518MK) constitutes the authority required to proceed with the resolution of the proceeding. Furthermore, we note that Southwestern's comments included an authorization from counsel for Nova, the current licensee of Station KQYT(FM), asserting that Nova will effectuate the reimbursement costs pledged to FCB by Southwestern. Therefore, Nova has demonstrated its willingness to comply with its reimbursement obligation to FCB.

8. Based on our review of Southwestern's response to the *Notice*, we find that there will be no significant adverse impact on noncommercial educational operations if Channel 221C2 is allotted at Green Valley, Arizona. Therefore, we believe that the public interest will be served by substituting Channel 221C2 for Channel 221A at Green Valley, since it could enable Station KQYT(FM) to provide an expanded coverage area FM broadcast service. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station KQYT(FM) to specify operation on Channel 221C2 in lieu of Channel 221A. In order to accommodate the allotment of Channel 221C2 at Green Valley, we will also substitute Channel 222A for Channel 221A at Bisbee, Arizona, and modify the license for Station KZMK(FM) accordingly.

9. Channel 221C2 can be allotted to Green Valley in compliance with the Commission's minimum distance separation requirements at the site specified in Southwestern's comments, which is located 6.2 kilometers (3.9 miles) northeast of the community. Channel 222A can be allotted to Bisbee at the licensed site of Station KZMK(FM). However, the Bisbee substitution should not be construed as authorizing any other change in the license for Station KZMK(FM) beyond its channel of operation.[5] Additionally, since Green Valley and Bisbee are located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government was received. Concurrence with respect to Bisbee was received for operation of Station KZMK(FM) on Channel 222A with a maximum power of 3 kW only, in accordance with the terms of the *United States-Mexican FM Broadcasting Agreement of 1972*, 24 UST 1815, TIAS No. 7697.

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 15, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Bisbee, Arizona	222A
Green Valley, Arizona	221C2, 246A

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to Nova Communications, L.P. for Station KQYT(FM), Green Valley, Arizona, IS MODIFIED to specify operation on Channel 221C2 in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Sierra-Pacific Broadcasting, Inc. (BLH-801124AF) for Station KZMK(FM), Bisbee, Arizona, IS MODIFIED to specify operation on Channel 222A in lieu of Channel 221A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the license (BLH-801124AF) except the channel, as specified above. Any other changes except for those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301); and

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with its license (BLH-801124AF) except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

13. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensees of Stations KQYT(FM) and KZMK(FM) and to the permittee of Station KXCI(FM), as follows:

Nova Communications, L.P.
Radio Station KQYT(FM)
6020 Cornerstone Ct., West
San Diego, CA 92121

Sierra-Pacific Broadcasting, Ltd.
Radio Station KZMK(FM)
3514 Kings Court
Sierra Vista, AZ 85635

Foundation for Creative
Broadcasting, Inc.
Radio Station KXCI(FM)
220 South Fourth Avenue
Tucson, AZ 85701

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The *Notice* inadvertently identified the licensee of Station KZMK(FM) as Cooper Valley Broadcasters, Inc.

[2] Because proposals affecting changes in the FM noncommercial educational band are addressed through the application process rather than in the rule making context, the Green Valley substitution was proposed contingent upon FCB filing an application and receiving authority to operate Station KXCI(FM) on Channel 217 at Tucson. FCB was granted a construction permit January 2, 1991 (File No. BPED-900518MK).

[3] Southwestern filed the instant proposal. An assignment of the license to Nova was granted January 26, 1990, and consummated April 5, 1990 (File No. BALH-891113HG). Southwestern's comments represent that Nova will carry out the reimbursement commitments to FCB and Sierra as set forth in the *Notice*. Therefore, all comments filed by Southwestern in support of this proposal will be treated as if filed by Nova.

[4] Collocation signifies that a noncommercial educational FM station's antenna is located within 0.4 kilometers (approximately 0.25 miles) or less from a TV Channel 6 station's antenna. *See* § 73.525(d) of the Commission's Rules. In this regard, Southwestern provided information indicating that a site has been secured from which FCB could relocate its transmitter to eliminate potential interference between Station KXCI(FM) and Station KUAT-TV.

[5] Coordinates used for Channel 221C2 at Green Valley are 31-55-34 and 110-56-27. These coordinates differ from those given in the *Notice*, based upon a requested revision contained in Southwestern's comments. Coordinates at the licensed site of Station KZMK(FM) are 31-28-52 and 109-57-30. Because the petition which resulted in these allotments was filed prior to October 2, 1989, the licensees of Stations KQYT(FM) and KZMK(FM) may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to each other. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-328

In the Matter of

Amendment of Section 73.202(b),	RM-6777
Table of Allotments,	RM-7047
FM Broadcast Stations.	
(Belvidere, New Jersey, Scranton and Tannersville, Pennsylvania)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 15, 1991; Released: March 1, 1991

By the Acting Chief, Allocations Branch:

1. At the request of WRNJ-Daytimer ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 6014 (1989), proposing the allotment of Channel 296A to Belvidere, New Jersey, as the community's first local FM service. In order to comply with the Commission's minimum distance separation requirements, an *Order to Show Cause* was issued to The Scranton Times as to why its license for Station WEZX at Scranton, Pennsylvania, should not be modified to specify operation on Channel 295A in lieu of its present Channel 296A. The Scranton Times ("Scranton Times"), West-Land Communicators, Inc. ("West-Land"), licensee of Station WZFM, Channel 296A, Briarcliff Manor, New York, Family Stations, Inc. ("Family"), licensee of noncommercial educational Station WKDN, Channel 295A, Camden, New Jersey, and the petitioner filed comments. Petitioner also filed reply comments. In addition, the Reiter Company filed a counterproposal requesting the allotment of Channel 296A to Tannersville, Pennsylvania, as its first local service.[2]

2. The Scranton Times opposes the modification of its license for Station WEZX to specify Channel 295A. It recognizes that the Commission can order the modification of a station's license to an equivalent channel. However, it argues that Channel 295A is not equivalent to its present Channel 296A, and thus its license should not be modified, citing *Vallejo, California*, 40 R.R. 2d 648 (1977). Scranton Times states that it intends to seek a power increase to 6 kW on its present channel, pursuant to the recent decision increasing the power of Class A stations from 3 kW to 6 kW.[3] *See* 4 FCC Rcd 6375 (1989). Scranton Times submits that 6 kW operation on its present channel is possible because Station WEZX complies with the new separation requirements to all stations except for a minor 1.8 kilometer short-spacing to a construction permit for a new station on third-adjacent Channel 299A at Tunkhannock, Pennsylvania. Conversely, it submits that 6 kW operation on Channel 295A would result in a 15.1 kilometer short-spacing to co-channel Class B Station WPCX, Auburn, New York, and a minor short-spacing to Class B Station WKDN, Camden, New Jersey. Finally, it states that Station WEZX needs the increase in power to 6 kW because the station presently serves only 88% of its community of license. The failure to serve all of Scranton, according to Scranton Times, results from the coverage limits of a 3 kW Class A station and Scranton's large land area. Therefore, Scranton Times urges that petitioner's proposal be denied. In the alternative, it requests a hearing on the proposed modification of Station WEZX's license.

3. West-Land, licensee of Station WZFM, Channel 296A, Briarcliff Manor, New York, opposes the allotment of Channel 296A to Belvidere unless a site restriction of 11 kilometers northwest instead of the proposed 3.3 kilometers (2.1 miles) north is imposed. West-Land states that it is presently licensed to operate at 3 kW and 99 meters with a construction permit to increase height above average terrain to 124 meters and decrease power to 1.95 kW. It notes that the change in Station WZFM's power and antenna height was sought because the owner of the tower supporting the station's main antenna wants to lease the space presently used by Station WZFM to other users. Therefore, in order for West-Land to remain on the tower, it states that it is necessary to increase the overall height of the supporting tower and move Station WZFM's antenna upward. However, it states that an official of the zoning board has informed the tower owner that its request for a building permit will be denied. Therefore, West-Land states that it is forced to relocate its antenna to a new site. West-Land further states that, despite tight spacing requirements and site availability constraints, a suitable alternative transmitter site has been found and it is now in the process of preparing an application for modification of Station WZFM's construction permit.[4] It believes that there are no other viable alternative sites. Unfortunately, the transmitter site which West-Land has found would be short-spaced to Channel 296A at Belvidere, as proposed with the 3.3 kilometer north site restriction. Therefore, should the Commission ultimately decide to allot Channel 296A to Belvidere, West-Land requests that it be so site restricted as to protect its proposed transmitter site. In support, it states that the Commission routinely substitutes one reference point for another and/or one channel for another to accommodate the authorization of a new or improved service elsewhere, citing *Vero Beach, Florida*, 4 FCC Rcd 2184 (1989), *Freedom and Morgan Hill, California*, 2 FCC Rcd 2182 (1987), *recon. den.*, 4 FCC Rcd 3927 (1989), *Miami, West Virginia*, 58 R.R. 2d 146, 148 (1985), *Micanopy and Williston, Florida*, 50 R.R. 2d 1425 (1982), and *Marshfield, Massachusetts*, 33 R.R. 2d 611, 613 (1975). West-Land argues that imposing a site restriction on Channel 295A at Belvidere serves the public interest by promoting efficient use of the spectrum.

4. Family, licensee of noncommercial educational Station WKDN, Channel 295B, Camden, New Jersey, opposes the allotment of Channel 295A to Belvidere. It argues that the allotment will be "shoe-horned in" and thus is marginal at best. Family states that the required separation between its Station WKDN and proposed Channel 296A at Belvidere is 105 kilometers and that this separation is met only by rounding the distance off to the nearest kilometer. In addition, it points out that a Channel 295A allotment at Belvidere barely meets the required separations to Station WZFM and Station WYCL(FM), Channel 298B, Boyertown, Pennsylvania. Although Fam-

ily acknowledges that the required minimum distance separation requirements are met, it argues that the Commission should more carefully scrutinize the proposal because of the apparent limited leeway in siting the transmitter. Further, while the allotment could provide Belvidere with its first local FM service, Family states that the Commission should focus on strengthening existing service as well as facilitating new services. In this regard, Family states that it relies on the contributions of listeners which reside up to and beyond Station WKDN's 60 dBu contour. Therefore, it is concerned that the initiation of such a closely spaced service at Belvidere will result in interference to Station WKDN's present service area. Because of the change in channel for Station WEZX at Scranton, thus causing Stations WKDN and WEZX to become co-channel services, Family is also concerned that the Belvidere allotment will result in increased interference between the Stations WKDN and WEZX as well as adversely affecting the translator service which Family provides in Pennsylvania.

5. Petitioner reiterates its intention to apply for Channel 296A, if allotted to Belvidere, and to reimburse Station WEZX for the reasonable costs associated with the change in its operating channel. It asserts that the allotment of a first local service to Belvidere provides a higher public interest benefit than would the expansion of a station's existing service. In support, it cites *Revision of FM Policies and Procedures* (" *Revision* "), 90 FCC 2d 88 (1982); *Scranton and Surfside Beach, South Carolina*, 3 FCC Rcd 2798 (1988), *recon. denied*, 4 FCC Rcd 2366 (1989); *Haltom City, Texas, et al.*, 4 FCC Rcd 5396 (1989); and *Atmore, Alabama, et al.*, 4 FCC Rcd 7556 (1989). Petitioner agrees that the Commission in *Vallejo, California, supra*, did find that one Class A channel is not necessarily equivalent to another. However, it submits that in the *Vallejo* proceeding, unlike here, the station demonstrated that there would be an actual loss of coverage due to interference from another station. In this proceeding, petitioner states that there will be no loss of existing service by Station WEZX if it operates on Channel 295A rather than Channel 296A. Petitioner notes that WEZX submitted an application specifying 6 kW operation on September 25, 1989. However, petitioner argues that: (1) the directional antenna system proposed by WEZX cannot be achieved; (2) the proposed change in facilities will result in substantially less coverage area than projected; and (3) the proposed facilities will not provide 70 dBu service to all of Scranton. On the other hand, petitioner argues that despite the short-spacings to Class B Stations WPCX and WKDN, a non-directional 6 kW operation on Channel 295A at Scranton, in compliance with Section 73.215 of the Commission's Rules, is possible. Petitioner also states that no weight should be given to the fact that Station WEZX does not presently provide all of Scranton with a city-grade signal. Rather, it states that the Commission recognizes 80% coverage as being an acceptable level of service and thus recognizes no deficiency where coverage of 88% of a community is provided. In support, it cites *John R. Hughes*, 50 FR 6579 (1985), and *A. B. C. D. Broadcasting Co.*, 2 FCC Rcd 6551 (1987).

6. Petitioner also contends that Family's concerns about the spacing between Channel 296A at Belvidere and its Station WKDN at Camden, New Jersey, are without sufficient merit to warrant denial of petitioner's proposal. As recognized by Family, the proposed allotment at Belvidere complies with the Commission's minimum distance separation requirements. Further, it states that an area of 79 square kilometers is available for locating the Belvidere transmitter, which it characterizes as more than adequate. Petitioner also contends that Family's argument concerning the loss of service beyond Station WKDN's 60 dBu contour deserves no consideration. Rather, as stated in Section 73.209 of the Commission's Rules, petitioner points out that existing stations are not protected from interference beyond their 60 dBu contours. Likewise, translators are secondary services and thus operate only to the extent that they cause no interference to full service stations. *See* Section 74.1203 of the Commission's Rules.

7. West-Land's opposition, according to the petitioner, also does not merit denial of the allotment of Channel 296A to Belvidere. Petitioner states that West-Land does not need a height increase or site relocation for any reason other than a desire to improve its coverage area. West-Land has stated that a zoning official has advised the tower owner that approval of its request to increase the height of the tower will be denied. However, petitioner argues that no supporting evidence has been provided and under well-established case law, zoning approval is presumed unless contrary evidence is offered establishing that such authorization cannot be obtained, citing *WCLY-TV, Inc.*, 43 FCC 2d 818 (Rev. Bd. 1973). Further, petitioner notes that West-Land has not filed an application for a new transmitter site and, in fact, believes that there may be problems in obtaining zoning approval for West-Land's desired site. Thus, petitioner argues that use of West-Land's proposed transmitter site at this time is speculative and thus does not deserve protection. It also contends that use of West-Land's proposed site would result in an increase in Station WZFM's existing short-spacings to Stations WLTW, Channel 294B, New York, New York, and Station WBLS, Channel 298B, New York, New York, in contravention of Section 73.213 of the Commission's Rules which prohibits an increase in an existing short-spacing where the 1 mV/m contour overlap of the two stations would be extended. Finally, petitioner argues that an 11 kilometer northwest site restriction on Channel 296A at Belvidere would virtually eliminate any suitable site area and thus force an applicant to seek a short-spacing waiver. Petitioner contends that the area available for siting the Belvidere transmitter would be reduced from 79 square kilometers to only 6.9 square kilometers. Thus, it contends that West-Land should be required to provide a showing that a tower site is available for the Belvidere allotment. Finally, petitioner submits that the transmitter site proposed by West-Land for Channel 296A at Belvidere is 13.7 kilometers from Belvidere's farthest boundary, thus calling into question whether the station would be able to comply with the city-grade service requirements of Section 73.315 of the Commission's Rules.[5]

8. We have carefully considered the pleadings before us and find that the public interest would be better served by allotting Channel 296A to Belvidere, as the community's first local FM service and modifying Station WEZX's license to specify operation on Channel 295A than by retaining Channel 296A at Scranton. Petitioner has restated its intention to reimburse Scranton Times for the reasonable costs involved in changing Station WEZX's operating channel. We further find that the objections of Scranton Times, West-Land and Family do not provide sufficiently compelling public interest benefits to warrant the denial of petitioner's request to provide Belvidere with its first local FM service. We further find that

Scranton Times has not raised a substantial and material question of fact which would require a hearing on the proposed modification. It is unfortunate that Station WEZX is able to provide only 88% of Scranton with a city-grade signal with its currently licensed facilities. However, this constitutes an acceptable level of service under Commission policy because at least 80% of Scranton is covered by Station WEZX's 70 dBu signal. *See, e.g., A. B. C. D. Broadcasting Co.*, 2 FCC Rcd 6551 (1987).

9. Contrary to the arguments of Scranton Times, we also find that Channel 295A is equivalent to Channel 296A for allotment purposes. Station WEZX's present channel is limited to a maximum power of 3 kW at 100 meters height above average terrain or its equivalent. The fact that it may be easier, or even possible, for Station WEZX to increase power to 6 kW on Channel 296A is irrelevant to the equivalency issue. Channel 295A can be utilized with the same power and height presently employed by Station WEZX, and at the station's licensed transmitter site. No special circumstances have been pointed out that would undermine this finding of equivalency. In particular, West Land has not shown that use of Channel 295A would result in a loss of service as in *Vallejo, California, supra*, or that environmental considerations or air hazards would prevent use of this channel. *See, e.g., Vero Beach, Florida*, 3 FCC Rcd 1049 (1988), *rev. denied*, 4 FCC Rcd 2184, 2185 (1989). Therefore, the issue to be decided is whether the public interest would be better served by the allotment of a first local FM service at Belvidere or the grant of Scranton Times' minor modification application seeking an increase in power for Station WEZX but with no change in the station's class.

10. The allotment priorities set forth in *Revision, supra*, are as follows:

(1) First fulltime aural service;

(2) Second fulltime aural service;

(3) First local service; and

(4) Other public interest matters.

[Co-equal weight given to priorities (2) and (3)]

Under these allotment priorities, we believe that the decision is clear. Neither the allotment of Channel 296A to Belvidere nor the possible increase in power by Station WEZX at Scranton to 6 kW operation would provide any first or second fulltime aural service. However, the allotment of Channel 296A to Belvidere furthers the third priority of providing as many communities as possible with a first local service while the retention of Channel 296A at Scranton, even with a possible increase in power to 6 kW, furthers the lesser priority of permitting an existing station to expand its present coverage area. While it might be true that 6 kW operation by Station WEZX at Scranton could enable it to provide 70 dBu service to all of the community rather than the 88% currently so served, we find that Scranton Times has made no showing that the population presently not receiving a 70 dBu signal from the station are inadequately served.

11. We also find that the objections raised by West-Land and Family are insufficient to warrant a denial of petitioner's proposal. West-Land has provided insufficient data to demonstrate that it must relocate Station WZFM's transmitter. There is no documentation from any official of the zoning board attesting to the fact that the increase in tower height will not be permitted or that the owner of the tower will no longer make space available for Station WZFM's transmitter. Further, West-Land has not demonstrated that there are no sites available for use by Station WZFM other than the one discussed in its comments or that use of its desired site will provide a greater public benefit, such as the provision of a first or second fulltime aural service, than would accrue from providing Belvidere with its first local FM service. Finally, at the time West-Land submitted its comments in this proceeding, no application had been filed to relocate Station WZFM's transmitter site to either the site described in its comments or to any other site. Therefore, West-Land was seeking protection of a site which it failed to demonstrate should be considered as anything more than a preference and also one where its use would be speculative. *See Andalusia, Alabama*, 49 FR 32201, August 13, 1984, and *Las Vegas, Nevada*, 51 FR 9453, March 19, 1986.[6]

12. Family states that the allotment of Channel 296A to Belvidere could impact the service which Station WKDN currently provides to people residing beyond its 60 dBu contour. In this respect, Family seeks protection for its operation beyond that which is permitted by the Commission's Rules. Section 73.209 of the Commission's Rules states that a station's interference protection is limited solely to that which results from the distance separation requirements and the rules governing maximum power and antenna height. While Family may not be able to provide the same level of service to those persons residing outside Station WKDN's 60 dBu contour, we find that the licensee is not entitled to such protection. *See Dunn, North Carolina, et al.*, 4 FCC Rcd 2301 (1989). The Belvidere allotment complies with the mileage separation requirements and applications filed for the use of the channel will also be expected to comply with the same separation requirements.

13. Family also objects to what it classifies as a "shoehorned in" allotment. However, we note that the Commission routinely rounds off mileage separations in determining compliance with the mileage separation requirements. *See* Section 73.208(c)(8). While it may be correct that there is not an abundance of transmitter sites for Channel 296A at Belvidere, we find that no party has presented information to support a finding that that there are no suitable transmitter sites available. Indeed, petitioner has indicated that approximately 79 square kilometers are available for siting the Belvidere transmitter, which should be adequate for this purpose. Family is also concerned about interference which may be caused to the translator service which it now provides in Pennsylvania. However, translators are considered to be a secondary service and are not protected against the initiation of a full service facility. *See* Section 74.1203 of the Commission's Rules. Finally, Station WKDN will continue to receive the interference protection to which it is entitled even though Station WEZX at Scranton will become a co-channel operation instead of its present first-adjacent operation.

14. Channel 296A can be allotted to Belvidere, New Jersey, in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.3 kilometers (2.1 miles) north to avoid a short-spacing to Station WKDN, Channel 295B, Camden, New Jersey, and to Station WYCL, Channel 298B, Boyertown, Penn-

sylvania. Channel 295A can be allotted to Scranton in compliance with the Commission's minimum distance separation requirements and can be used at Station WEZX's present transmitter site.[7] Canadian concurrence in the allotment of Channel 295A to Scranton has been received since Scranton is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

15. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 15, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Belvidere, New Jersey	296A
Scranton, Pennsylvania	258A, 267B, 285A, 295A

16. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of The Scranton Times for Station WEZX, Scranton, Pennsylvania, IS MODIFIED to specify operation on Channel 295A, in lieu of Channel 296A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WEZX's license, BLH-861117KC, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-861117KC, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

17. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee, as follows: The Scranton Times, 149 Penn Avenue, Scranton, Pennsylvania 18503.

18. IT IS FURTHER ORDERED, That the counterproposal of the Reiter Company (RM-7047) IS DISMISSED.

19. The window period for filing applications for Channel 296A at Belvidere, New Jersey, will open on **April 16, 1991,** and close on **May 16, 1991.**

20. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

21. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Tannersville, Pennsylvania, has been added to the caption.

[2] Public Notice of the counterproposal was given on October 10, 1989, Report No. 1799. However, on February 27, 1990, the Reiter Company withdrew its counterproposal, stating that it no longer intends to apply for the channel, if allotted to Tannersville. Therefore, since no other party expressed an interest in use of the channel, we will dismiss the request. In light of the dismissal, we will not discuss the counterproposal or comments responsive thereto. In addition, after the record closed, Scranton Times filed a Motion for Leave to File a Supplement to Opposition to Notice of Proposed Rule Making and Order to Show Cause and a Statement for the Record. The Commission's Rules do not authorize the filing of pleadings beyond the comment and reply comment period. Further, we find that the pleading provides no information of decisional significance which would warrant a waiver of the Commission's Rules. Therefore, the untimely filed pleading of Scranton Times will not be accepted for consideration in this proceeding.

[3] We note that Scranton Times filed an application for an increase in power to 6 kW on September 25, 1989 (BPH-890925IL).

[4] Although West-Land states that it has not yet submitted an application for the new transmitter site, it provides coordinates of North Latitude 41-02-58 and West Longitude 73-55-40.

[5] Channel 296A has been proposed for allotment to Belvidere as a 3 kW facility since the proposal was filed prior to October 2, 1989. Therefore, city-grade coverage for such Class A allotments are assummed only if the transmitter is located less than 13 kilometers from the center-of-city coordinates.

[6] Although West-Land had not tendered an application to change its transmitter site at the time it filed its comments in this proceeding, West-Land did file such an application (BMPH-910125IH) on January 25, 1991. We note that the coordinates specified in the application are not those it sought protection for in its comments. However, based upon the record before us and the precedent cited above, this application also constitutes a mere site preference and does not outweigh the public interest benefit of allotting a first local FM service to Belvidere.

[7] The coordinates for Channel 296A at Belvidere are North Latitude 40-51-17 and West Longitude 75-04-50. The coordinates for Channel 295A at Scranton are North Latitude 41-25-41 and West Longitude 75-44-50. Because the petition which resulted in these allotments was filed prior to October 2, 1989, applicants for Channel 296A at Belvidere may avail themselves of the provisions of Section 73.213(c)(1) with respect to Stations WKDN, Channel 295B, Camden, New Jersey, WZFM, Channel 296A, Briarcliff, New York, and WZVU, Channel 296A, Long Branch, New Jersey. Likewise, Station WEZX(FM), Scranton, may use the spacings set forth in Section 73.213(c)(1) with respect to Stations WKDN, Camden, New Jersey, and WPCX, Channel 295B, Auburn, New York.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-47

In the Matter of

Amendment of Section 73.202(b), RM-7620
Table of Allotments,
FM Broadcast Stations.
(Fairfield, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 19, 1991; Released: March 1, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Fairfield Communications ("petitioner") requesting the allotment of Channel 255A to Fairfield, Illinois, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by this proposal since it could provide Fairfield with its first local FM channel. A Commission engineering analysis has determined that Channel 255A can be allotted to Fairfield in compliance with the Commission's minimum distance separation requirements with a site restriction 4 kilometers (2.5 miles) northwest of the community,[1] in order to avoid a short-spacing to Station WKDQ(FM), Channel 258C, Henderson, Kentucky.

3. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Fairfield, Illinois	--	255A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 22, 1991,** and reply comments on or before **May 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Philip M. Baker
4701 Willard Avenue
Washington, D.C. 20815
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are North Latitude 38-24-21 and West Longitude 88-23-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements
for Cost Support Material
To Be Filed with 1991 Annual
Access Tariffs

ORDER

Adopted: February 5, 1991; Released: February 6, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This Order sets forth certain requirements for summary cost support material that local exchange carriers (LECs) must file to support their annual access charge tariff filings on or before April 2, 1991[1] in partial fulfillment of the requirements established in Sections 61.38 and 61.41 through 61.49 of the Commission's Rules.[2] Specific data formats are detailed in the Tariff Review Plan (TRP), and are appended to this Order. [3] The TRPs display basic cost, demand, and rate information in a manner that is consistent for all LECs, thereby aiding review by the Commission and interested parties of the LECs' required annual access tariff filings. The TRPs have served this purpose effectively in past years.

A. Background

2. The background concerning the development of previous TRPs can be found in our previous TRP Orders.[4] Based on our continued experience in reviewing the LECs' interstate access tariffs and in evaluating the usefulness of the TRP data provided by the LECs in previous filings, and based on various changes in the Commission's Rules and other changes,[5] it is necessary to modify last year's information requirements in certain respects. These modifications were developed after informal discussions with representatives of the LECs and other members of the industry and after comments on improvements and modifications to the 1990 TRP were requested from all interested parties.[6]

B. Price Cap Carriers

3. In the *LEC Price Cap Order*, the Commission adopted mandatory price cap regulation for the regional Bell Operating Companies (RBOCs)[7] and for GTE Telephone Operating Companies (GTOC). On November 1, 1990, these companies made their first price cap filings to be effective January 1, 1991. On November 1, 1990, United Telephone Companies (United) and Contel Corporation (Contel) also elected to file as price cap carriers. These carriers will make their 1991 annual access tariff filings under the price cap rules. Any other carrier which wishes to elect price cap regulation may do so at the time of the annual 1991 filing. A carrier subject to price caps, or electing price caps in this filing, must file the price cap TRP outlined in Section I of this Order, below.

C. Rate of Return Carriers

4. Carriers other than the RBOCs, GTOC, United, Contel, and those carriers which elect price caps remain subject to rate of return regulation. Carriers subject to rate of return regulation must file either the Tier 1 or Tier 2 TRP outlined in Sections III and IV, respectively, of this Order.

1. Definition of Tier 1 and Tier 2 Companies

5. As we have noted in previous TRP Orders, the LECs' ability to provide cost, demand, and revenue data varies depending on the size of the company.[8] In those Orders, we divided the LECs into two categories, Tier 1 operating companies and Tier 2 operating companies, and devised a different set of summary data requirements for each.

6. We are retaining, for carriers subject to rate of return regulation, the definitions of Tier 1 and Tier 2 companies used in the *1990 TRP Order*.[9] Thus, for this year's TRP, we will distinguish between Tier 1 and Tier 2 companies by applying the criterion that Sections 32.11(a) and 32.11(e) of the Commission's Rules use to distinguish Class A and Class B companies. Class A companies are those companies having annual revenues from regulated telecommunications operations of $100 million or more; Class B companies are those companies having annual revenues from regulated telecommunications operations of less than $100 million. The initial classification of a company is determined by its lowest annual operating revenues for the five immediately preceding years. Subsequent changes in classification are made when annual operating revenue shows a greater or lesser classification for five consecutive years. Tier 1 companies are those Class A companies which are not subject to price cap regulation by either Commission Order or election. Tier 2 companies are those Class B companies which are not subject to price cap regulation by either Commission Order or election.

7. In the *1990 TRP Order*, we distinguished smaller Tier 2 LECs from the larger Tier 2 LECs by applying the definition of small telephone company study areas adopted in the *Small Telephone Company Order*.[10] We then adopted different TRPs and different test years for the larger Tier 2 companies and the small telephone companies. For purposes of this Order, small telephone companies are differentiated as in the *1990 TRP Order*. Thus, small telephone companies, denoted Tier 2B companies, are those Tier 2 companies which are in National Exchange Carrier Association (NECA) Subset 3 and which serve 50,000 or fewer access lines.[11] All other Tier 2 companies are Tier 2A.[12] As before, only companies which file on a prospective basis and do not concur in the NECA traffic sensitive tariff are required to file TRPs.

2. Definition of Test Year and Past Year Cost of Service Period

8. The Commission's Rules require that carriers which are not subject to price cap regulation and are not small telephone companies must submit, in support of their proposed rate changes, a past year cost of service (PYCOS) study for the most recent 12-month period and a study projecting costs for a representative 12-month

period (test year).[13] Those rules also require that access rates be targetted to earn the authorized rate of return.[14] In the present case, the rates filed to be effective July 1, 1991, will be expected to remain in effect through June 30, 1992. We are adopting the period July 1, 1991, through June 30, 1992, as the test year for Tier 1 and Tier 2A LECs. All ratemaking must be based upon test year projections, except for small telephone companies, as noted below. For the purpose of the 1991 annual access tariff filings, we also direct Tier 1 and Tier 2A LECs to submit data for the period January 1, 1990, through December 31, 1990, as PYCOS data. As we discuss below, NECA must also use this PYCOS and test period.

9. We are establishing optional cost support requirements for Tier 2B telephone companies. The *Small Telephone Company Order* allowed small telephone companies to file access tariffs every other year, using the following optional cost support and ratemaking methods for tariffs effective on, or subsequent to, January 1, 1989: (1) a company must compute rates, for the first access filing, based on a "cost of service study for all elements for the most recent 12-month period with related demand for the same period", and for subsequent access filings, based on a "cost of service study for all elements for the total period since the local exchange carrier's last filing, with related demand for the same period";[15] (2) cost support need not be submitted with the filing; and (3) the Commission may require a company to submit such support information.

10. Small telephone companies which elect to file their rates on an historical basis must compute their access rates for the 1991 annual access tariff filng based on a cost of service study for the entire period since their 1989 annual access tariff filings.[16] Such companies need not submit their supporting data at the time of their filing, but should be prepared to submit the data promptly upon request by the Commission or interested parties.[17] Small telephone companies may also elect to make a filing this year based on a prospective test year. Small telephone companies that choose to use a prospective test year must use the test period and PYCOS period required of the larger telephone companies in this Order. We exercise our discretion pursuant to Sections 61.38(a) and 69.39(a) of the Commission's Rule to direct small telephone companies which elect to use a prospective test year to accompany their 1991 annual access tariff filing with the cost support data required by this Order for Tier 2A companies.[18]

II. PRICE CAP TARIFF REVIEW PLAN

11. Initial LEC price cap filings were made November 1, 1990. With some changes, the price cap TRP used for the November 1, 1990 filing is being adopted for price cap LECs for this annual access tariff filing. In the following paragraphs, we discuss the purpose of, and changes to, the price cap TRP charts. Attachment A of this order provides the charts for the price cap TRP.

A. Chart IND

12. This summary chart is a slightly modified version of the second page of chart SUM-1 in the November 1, 1990 TRP. It displays the existing Price Cap Indexes (PCIs), Actual Price Indexes (APIs), Service Band Indexes (SBIs), the DS1 and DS3 subindexes, and the cap on the Carrier Common Line (CCL) rate. This chart also displays the new upper and lower bands on the SBIs and subindexes.

B. Chart PCI

13. This chart provides the data needed to compute, and the computation of, the PCI for the four baskets. It displays, by basket: (1) GNP-PI, the Gross National Product Price Index, the measure of inflation; (2) X, the productivity factor;[19] (3) Y, the access expense at the last update of the PCI;[20] (4) the change in access expense; (5) the change in exogenous costs; (6) R, base period revenue;[21] (7) w, the weighting factor used in computing the PCI; and (8) g, the growth in minutes per line.[22]

C. Chart SUM

14. This chart provides base period (calendar 1990) demand multiplied by current rates and proposed rates, and the difference between the two, for each basket and service category. It is a slightly modified version of the first page of chart SUM-1 in the November 1, 1990 filing.

D. Chart EXG

15. This chart provides supporting data for computation of the exogenous change amount used in computing the PCI. It displays, by basket, the same data given in Chart COS-3 in the Tier 1 TRP.

E. Chart RTE

16. This chart displays aggregate data which can be used to compute the APIs, SBIs, and sub-indexes. It displays base period (calendar 1990) demand, current rates, proposed rates, and revenues computed by multiplying base period demand by current and by proposed rates. It also displays the APIs, SBIs, and subindexes. The data reported on this chart is not at the rate element level of detail.[23] This aggregate format chart RTE is necessary to allow rapid, consistent verification of the computation of the indexes across all companies.

17. We note that in their November 1, 1990 filings, all price cap LECs except United provided printed data which displayed base period demand and existing and proposed rates at the rate element level of detail. These data also contained computations of the APIs, SBIs, and subindexes. This rate element level of detail proved helpful in our review of the November 1, 1990 filing in certain cases in which the companies' computed indexes did not exactly match the indexes which could be computed from the aggregate data. In addition to chart RTE, we therefore also require price cap LECs to provide these rate element detail charts in mechanized and hard copy format. We are not specifying the exact format for these charts, because each price cap LEC will have a different number of rate elements. As in the November 1, 1990 filings, these charts should include, by each identified rate element, base period demand, existing and proposed rates, and computation of the indexes from these data.

18. In addition to the requirements specified above, price cap carriers will be required to include with their support materials a list of all currently applicable Part 69 waivers that result in rate elements different from those specified in Part 69 of the Commission's Rules. The list shall be composed of the following information: (1) a citation to the Commission or Bureau Order granting the waiver; (2) a brief description of the waiver, including

whether any new rate elements were created; and (3) the basket and, if applicable, the service category treatment of any rate elements created by the waiver. The listing of baskets and service categories for new rate elements will assist us in verifying carrier compliance with the basket and service category structure established in the *LEC Price Cap Order*.

19. In the November 1, 1990 filing, some companies reported rates rounded off to a number of digits, rather than the rates actually listed in the tariffs. In a few cases, these differences were great enough to make the indexes computed from the aggregate data differ from the reported indexes. The LECs must therefore report rates on this chart to the number of decimal places reflected in their tariffs. Minutes of use data must be reported in thousands, and lines data in units.

F. Procedures for LECs Withdrawing from NECA Pools

20. The rules adopted in the *LEC Price Cap Order* allow companies in NECA pools to withdraw from those pools and to elect price caps effective on July 1, 1991.[24] The *LEC Price Cap Order* also delegated to the Bureau authority for developing a method for companies to leave the pools and move directly to price cap regulation.[25] The method we proposed was to have those companies withdrawing from NECA pools base rates on, and provide documentation of, actual costs and demand for July 1, 1990 through December 31, 1990 for initial traffic sensitive rates, and costs and demand for this period adjusted for recent changes in common line costs and growth in demand for initial common line rates. These figures would be adjusted to reflect the allowed 11.25 percent rate of return, and further adjusted for the Subscriber Plant Factor (SPF) changes, Dial Equipment Minute (DEM) changes, and any other exogenous changes that occurred on January 1, 1991. The rates developed in this way would then be used as the starting rates for price caps.

21. Alltel, Lincoln, and Rochester filed comments on our proposed method. In general, they argued that our proposed method would not capture a full year's seasonality effects, because we would be relying on six months of actual data. They proposed that carriers be allowed to use twelve months of data; six months of actuals for July 1, 1990 through December 31, 1990 and six months of forecasts from the twelve-month forecasts filed on April 2, 1990 for the July 1, 1990 through June 30, 1991 test period. These rates would be adjusted to earn 11.25 percent to reflect the change in the rate of return to 11.25 percent on January 1, 1991, and would be adjusted to reflect the Subscriber Plant Factor (SPF) and Dial Equipment Minutes (DEM) changes which occurred since July 1, 1990. This would allow them, they argue, to start price caps on the same footing as companies who started price caps on January 1, 1991.

22. The companies' proposed method of developing starting rates for price caps appears reasonable, with one change. Companies which started price caps on January 1, 1991, used their July 1, 1990, rates, which were based on forecasts for an entire year, as their starting rates. Companies which withdraw from NECA pools to elect price caps effective with this filing shall therefore also use as their starting point rates derived from their July 1, 1990 forecast of costs and demand, adjusted for any disallowances and for the change in the rate of return to 11.25 percent, just as the other price cap carriers did in their November 1, 1990 filings.[26] This will ensure that carriers which elect price caps effective July 1, 1991 will start on the same footing as those which began on January 1, 1991.

III. TIER 1 TARIFF REVIEW PLAN

23. The TRP requirements have evolved over time, based on the experience of the Commission and other parties in using the TRPs to evaluate the annual filings and of the LECs in preparing them. In many ways, the 1991 Tier 1 TRP charts are similar to those in the 1990 TRP. Based in part on the suggestions contained in the responses to the *December 10 Public Notice*, certain changes have been made to the Tier 1 TRP. These changes involve elimination of unneeded or obsolete requirements and the addition of requirements that will improve the Commission's ability to evaluate the rates. These new requirements have been framed to place the smallest possible burden on the LECs, while allowing us to evaluate the rates filed by the carriers. In the following paragraphs, we discuss the most important changes in TRP requirements. Attachment B of this Order provides the charts for the Tier 1 TRP.

A. Cost Charts (COS)

24. The 1990 TRP incorporated historical data filed in ARMIS reports, and used the format of these ARMIS reports for reporting prospective data. The automated system of reports adopted under ARMIS consists of four reports: The Quarterly Report (Report 43-01),[27] which provides aggregate quarterly financial data reflecting the results of accounting and cost allocation requirements prescribed in Parts 32, 64, 36, and 69; The USOA Report (Report 43-02),[28] which shows annual data for every account prescribed in Part 32, the Uniform System of Accounts; the Joint Cost Report (Report 43-03),[29] which shows allocations of annual costs between regulated and nonregulated activities as required by Part 64; and the Access Report (Report 43-04),[30] which shows the results of the jurisdictional separations and access charge rules as prescribed in Parts 36 and 69, respectively. These four ARMIS reports are filed in mechanized and printed form.

25. The data required by these charts proved valuable in our analysis of the rates filed in the 1990 annual access tariff filing. Provision of these data allowed us to avoid burdensome and time-consuming investigations that were necessary in earlier annual access tariff filings.

26. The historical data required by the April 1, 1991, ARMIS filings in Charts 43-01, 43-03 and 43-04 reflect the same time period (calendar year 1990) as that adopted in this Order for use as the PYCOS period for the 1991 annual access tariff filings. Since these data provide adequate historical financial information concerning the LECs' operations during the PYCOS period, in order to reduce the LECs' reporting burdens, we will use information that the LECs provide in compliance with the April 1, 1991, ARMIS filing requirement for Charts 43-01, 43-03, and 43-04[31] for Charts COS-1(H), COS-6(H), and COS-7(H) in the 1991 TRP. Further, we are adopting the formats of ARMIS Charts 43-01, 43-03, and 43-04 for the provision of detailed prospective (test year) cost data in Charts COS-1(P), COS-6(P), and COS-7(P).[32]

27. A chart by chart summary description of the TRP charts, including the most important modifications of the 1991 TRP is as follows:

(1) *Chart COS-1*: This chart is a prospective version of ARMIS Report 43-01. Historical data in the same format is provided by ARMIS Report 43-01.

(2) *Chart COS-2*: This chart provides total company and interstate time series cost data. As in the 1990 TRP, we need to obtain actual and forecast data in which inside wire and settlements expenses are treated consistently, and therefore are requiring the companies to file data which, as in the 1990 TRP, excludes these expenses for both historical and prospective time periods. Companies should exclude all expenses, both regulated and non-regulated, associated with inside wire, including maintenance, depreciation, and amortization. Companies should also exclude those settlement expenses which are access expenses (Account 6540) paid to another company.

(3) *Chart COS-3*: This chart displays the impacts of major rule changes and other changes. Various items for which estimates of cost impacts are required have been updated.

(4) *Chart COS-4*: This chart is the "report card" for the 1988, 1989, and 1990 test years. Forecasts and actuals for the 1988 and 1989 test years are required. The forecasts for July, 1990 through June 30, 1991, (the 1990 test year), and for July 1, 1991 through June 30, 1992 (the 1991 test year) are added. In addition, companies must report actuals for July 1990 through December 1990 and for calendar 1990 data. The data on this chart are used to assess the accuracy of the companies' forecasts. On this chart in the 1989 annual access tariff filing, certain companies reported their forecasts on one basis, but their actuals on another.[33] Such inconsistent treatment renders direct comparison of forecasts and actuals impossible. The forecasts reported on this chart must be those reported in previous TRPs. Companies must ensure that the actuals reported for each period on this chart are on the same basis and include the same accounts as the forecast for that period. Consistent with our policy in the *1989 TRP Order*, we will not credit "report card" data which indicate a company has grossly underforecast its actuals, because we will presume that the actuals are not on the same basis as the forecasts (contrary to the instructions for this chart), unless the company fully explains the reason for the under-forecast.

(5) *Chart COS-5*: This chart provides data on equal access, and is unchanged, except for updating the time periods.

(6) *Chart COS-6*: This chart is a prospective version of ARMIS Report 43-03. Historical data in the same format are provided by ARMIS Report 43-03. This chart is useful in evaluating the split between regulated and non-regulated expenses. Lincoln notes that the Commission is requiring significantly increased audit work on ARMIS Report 43-03 starting with 1990 data, and that this should ensure that the companies are following their Cost Allocation Manuals. Lincoln further asserts that this, combined with the fact that the regulated and non-regulated allocations are included on COS-1(P), renders chart COS-6(P) unnecessary. We do not agree. Chart COS-6(P) is still necessary to ensure that costs are correctly assigned. We are therefore requiring that this prospective chart be filed.

(7) *Chart COS-7*: This chart is a prospective version of ARMIS Report 43-04. Historical data in the same format are provided by ARMIS Report 43-04. This chart is useful in evaluating growth in cost accounts. Lincoln argues this chart is unnecessary because the data were used last year only in our cross sectional analysis. Lincoln further states that, with the greatly reduced number of carriers filing the Tier 1 TRP, this analysis will no longer be meaningful. We believe, however, that the data on this chart will still be useful in identifying sources of increased costs in comparison to historical costs. Therefore, we still require this chart.

B. Depreciation Chart (DEP)

(1) *Chart DEP-1*: Chart DEP is unchanged from the 1990 TRP, except that the PYCOS period and test year are updated. However, only those Tier 1 companies whose depreciation rates are prescribed by the Commission are required to file the DEP-1 chart.

C. Demand Charts (DMD)

28. The 1991 TRP eliminates certain Chart DMD requirements contained in the 1990 TRP in accordance with commenters' suggestions and our experience with the 1990 TRP. Specifically, for the reasons discussed below, it eliminates all data prior to January 1988 for Chart DMD-1, prior to 1989 for Chart DMD-2, and prior to 1988 for Chart DMD-5.

(1) *Chart DMD-1*: This chart involves time series of Common Line (CL) and Traffic Sensitive (TS) minute of use (MOU) data. Data provided on this chart in previous annual access tariff filings are subject to revision for out-of-period adjustments for two years. In the 1990 TRP companies reported data on this chart through December 1989. Therefore, data from January 1988 forward need to be provided again this year to ensure the data reflect all out-of-period adjustments. Data provided in the 1990 TRP on LEC interexchange CCL MOU and AT&T minutes are no longer needed and need not be submitted.

(2) *Chart DMD-2*: This chart displays quarterly access line data. Chart DMD-2 is unchanged from the 1990 TRP except for the elimination of the requirement to file pre-1989 data. Data prior to 1989 were filed in the 1990 TRP and it is our understanding that the data are not subject to revision.

(3) *Chart DMD-3*: This chart is the "report card" for the 1988, 1989, and 1990 test years. Forecasts and actuals for the 1988 and 1989 test years are required. The forecasts for July 1, 1990 through June 30, 1991, (the 1990 test year), and for July 1, 1991 through June 30, 1992 (the 1991 test year) are added. In addition, companies must report actuals for July 1990 through December 1990 and for calendar 1990 data. The data on this chart are used to assess the accuracy of the companies' forecasts.

(4) *Chart DMD-4*: Chart DMD-4 requires the provision of special access demand data. Historical special access demand for channel terminations, interoffice mileage, and circuits is provided on a monthly basis (end-of-period) beginning with January 1988 for the total industry. As in the 1990 TRP, each LEC must provide a definition of services included in wideband.

(5) *Chart DMD-5*: This chart provides detailed demand and revenue data for common line, and is unchanged from the 1990 TRP except for elimination of the requirement to file pre-1988 data. Data for periods prior to 1988 are not subject to revision, have been provided in previous TRPs, and need not be submitted again this year.

D. Chart RTE

29. The RTE charts require the provision of (1) rate comparisons; and (2) revenue comparisons ("price-outs") under different rate assumptions. These charts permit the calculation of percentage changes in rates for entire rate categories. Comparisons should be made at the tariff level at which current rates are filed, not the tariff level at which 1990-91 rates are filed.

(1) *Chart RTE-1*: This chart displays end user and switched access rates. The chart is unchanged from the 1990 TRP except for the dates for which rates are displayed.

(2) *Chart RTE-2*: This chart displays selected special access rates. The chart is unchanged from the 1990 TRP except for the dates for which rates are displayed.

(3) *Chart RTE-3*: Chart RTE-3 displays access price-out comparisons, and is updated to reflect current rates. Using projected test year demand and proposed rates versus rates in effect in 1990, revenues and revenue comparisons are calculated for End User, Carrier Common Line, Switching, Local Transport, Information, Equal Access, and Special Access. Nonrecurring charges should also be included in all price-outs.

(4) *Chart RTE-4*: In this chart, companies list the companies with which they have pooled or averaged rates, for the following: Multiline Business, Residence and Single Line Business, Carrier Common Line, Switching, Local Transport, Information, Equal Access, and Special Access. This chart is updated to reflect test year pooling and averaging arrangements.

E. Chart ERN

30. This chart displays historical and projected rates of return for the access service categories. This chart shows earnings at the current level of aggregation.

F. Chart REV

31. These charts display revenue and revenue requirement. They are unchanged, except for updating the test year period.

(1) *REV-1*: This chart displays rate-making demand, rates, computed revenue, and revenue requirement for the test year. These data are provided for several rate elements within the access service categories.

(2) *REV-2*: This chart displays, by access service category, recurring and non-recurring revenue. It also displays individual case basis (ICB) revenues.

G. Chart SEP

32. This chart lists, by Part 69 elements and sub-elements, the change in the test year revenue requirement due to the introduction of new basic studies which LECs plan to implement in the test year. This chart is unchanged from the 1990 TRP, except for the time period reported. USTA proposes elimination of this chart, arguing that carriers provide information in their cost support detailing the effect of basic study changes. Basic studies are used by the LECs to develop separations factors to allocate costs to the state and interstate jurisdictions. To the extent LECs introduce these new basic studies in the prospective period, their forecast costs are not comparable to their historical costs. Therefore, provision of these data in a uniform and mechanized format will enable us to evaluate more accurately changes in costs between prospective and PYCOS periods. We are retaining this chart for these reasons.

H. Miscellaneous

33. We wish to clarify how companies must report settlement revenue from shared facilities in their TRPs. As in the 1990 TRP, the demand and revenue requirement, on both a prospective and historical basis, must be included in the data provided by the company filing the tariff for the shared facility and excluded from the data submitted by the company that does not file a tariff for the facility.

IV. TIER 2 TARIFF REVIEW PLAN

34. In this section we outline the requirements for Tier 2 companies. Attachment C of this Order provides the charts for the Tier 2 TRP. Based in part on the suggestions contained in the responses to the *December 10 Public Notice*, certain changes have been made to the Tier 2 TRP. These requirements have been adopted with a view toward minimizing the filing burdens of smaller companies and giving due weight to the concerns these companies have expressed regarding their ability to comply with the TRP data filing requirements.

35. In previous years, we have adopted slightly different TRPs for the Tier 2A and the Tier 2B companies, requiring less detailed data from the Tier 2B companies. This year, we conclude that a single TRP for both the Tier 2A and the Tier 2B companies would not be burdensome. Having only one version of the Tier 2 TRP would also simplify our analysis of the annual access tariff filings. Therefore, we are adopting one TRP for both the Tier 2A companies and those Tier 2B companies which choose to file using a prospective test year. The requirements for those Tier 2B companies which choose to use an historical test year are given in Section I.C.2, *supra*.

36. Chart T2COS-1, both historical and prospective, is an update of T2COS-1 from the 1990 Tier 2 TRP. We request that all Tier 2 companies which file prospectively also file Charts COS-6 and COS-7 in the Tier 1 TRP,

although we do not require them to do so. This information will enable us to better evaluate their rates. The 1990 TRP required only those Tier 2 carriers whose depreciation rates are prescribed by the Commission to file the T2DEP chart. It is our understanding that no Tier 2 company has depreciation rates set by the Commission, and thus the Chart T2DEP is not required in the 1991 TRP. Charts T2DMD-1, T2DMD-2, and T2DMD-3 are updates of the 1990 Tier 2 Charts T2DMD-1, T2DMD-2, and T2DMD-3. As in the 1990 annual access tariff filing, the DMD charts for Tier 2 companies reflect billed rather than normalized demand. The Charts RTE, ERN, and REV are essentially the same as in the Tier 1 TRP. Similarly, "report cards" for cost and demand forecasting, Charts COS-2 and DMD-4 in Attachment C, are required.

V. GUIDELINES AND REQUIREMENTS APPLICABLE TO NECA

37. We do not detail specific summary data requirements for NECA in this Order. The level of detail contained in the Tier 1 plans should provide guidance to NECA in formulating the summary data for the common line pool that it should include in its filing.

38. For calculation of NECA's common line pool revenue requirement and demand, and the resulting long term support payment, and for NECA's traffic sensitive rates, NECA must rely on the estimates for hundreds of small companies. For those companies, it would be difficult to provide the detail required by the Tier 1 TRPs. Therefore, we refrain from requiring that NECA provide Tier 1 summary data for these calculations. The level of detail required by the Tier 2 plan should provide guidance to NECA in formulating the summary data that it should include as support for these calculations. The fact that we refrain from requiring specific summary data from NECA for its rates and payment amounts does not exempt NECA from providing support data in compliance with Section 61.38 of the Commission's Rules.

39. We do, however, require NECA to provide Chart ERN for the historical and prospective periods. Also, in its Chart COS-1, NECA will need to include a line for settlements from its average schedule companies, as it did last year. We also require that NECA provide detailed cost support data concerning long term and transitional support calculations.

VI. GENERAL INSTRUCTIONS

40. The following general instructions apply to Tier 1 LECs and Tier 2 LECs, and, except as noted, to price cap LECs. Except for Section V.C, *infra*, the following general instructions also apply to NECA.

A. Errata

41. As we have noted in the past, the submission of incorrect cost support data and the subsequent filing of errata seriously detract from the ability of the Commission and interested parties to evaluate the rates within the notice period.[34] In previous TRP Orders, we required that any erratum be accompanied by a request for special permission to permit the transmittal to take effect on the originally scheduled effective date. Further, we required that, if such a request were refused, rates supported by the erratum must be refiled upon adequate notice, regardless of whether these rates differ from the rates as originally filed. We continue to believe that the special permission requirement is a reasonable means of encouraging improvement in the quality of data submitted in the annual access filings. We also believe it facilitates the tariff review process.

42. We therefore continue to require that carriers file a request for special permission with any erratum that is filed to correct errors or otherwise revise their access tariff support data. If such a request is refused, the carrier must refile the rates that are supported by the erratum, regardless of whether these rates differ from the rates as originally filed. These requirements pertain to all data filed in support of access charges, including all data that are required by the TRP. All TRP data must be filed no later than April 2, 1991, and must be accurate and complete.

43. In the 1990 tariff filing, a significant number of errata filings were submitted as late as April 25, 1990. For the 1991 annual access tariff filing, we may specify an early cut-off date for errata if it appears this will again occur. Carriers who discover errors after the cut-off will then be required to refile their tariffs with a later effective date. We also remind carriers, however, that they are under a legal obligation to correct any erroneous data discovered in the TRP or other cost support data.

B. Certification

44. NECA and the LECs must certify the accuracy of historical and test year data that are submitted in support of rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of revised rates, including all data that are required by the TRP. The text of the certification is the same as that adopted in the *1987 Waiver Order* [35] and the *1988 TRP Order*. The certification should be displayed as the last page in the binder containing each company's TRP.

C. Geographic Aggregation

45. Except for Charts RTE and ERN, all information required by the TRP must be displayed on the level of geographic aggregation to which the particular LEC's proposed rates pertain. Charts RTE and ERN must pertain to the current level of aggregation. In addition, if the tariff rates are based on data from a number of study areas or operating companies, levels of aggregation associated with each study area (state) and operating company should be provided by Tier 1 and Tier 2 carriers (except for Charts RTE, ERN, and REV). Price cap carriers need not provide TRP data below the level of geographic aggregation to which their proposed rates pertain. Carriers need not aggregate the data above the tariff filing level.

D. Assistance from USTA

46. In order that the Commission and interested parties may evaluate the national impact of revised rates, we request that the USTA Task Force provide an aggregation of all price cap LEC data (except for those charts and portions of charts for which aggregation is inappropriate) in both hard copy and disk format.[36]

E. Waivers

47. If carriers find that they are unable to provide data required by the TRP, they may file applications for waiver. These waiver applications must demonstrate good

cause for reporting a different or lower level of detail and must indicate how these deficiencies will be corrected. Carriers are strongly encouraged to comply with the requirements. Omission of individual data items or entries, without request for waiver, is unacceptable. If a carrier determines, however, that it will be unable to meet these requirements, it must file an application for waiver with the Commission no later than February 19, 1991. Oppositions to applications for waiver shall be filed not later than February 25, 1991. Each carrier requesting any waiver of the requirements of this Order or of any other Commission Rule or Order applicable to the 1991 annual access tariff filings shall include all such requests in this single application. Carriers should not delay undertaking development of data required by the 1991 TRP in anticipation that waiver requests will be granted.

48. In previous annual access tariff filings, commenters have requested that carriers be allowed to file data under proprietary protection. As in previous years, we are not persuaded that any data required by the 1991 TRP, including associated 1990 ARMIS data, require proprietary protection.

F. Technical Requirements

49. Price cap LECs, as well as Tier 1 and Tier 2A companies, and those Tier 2B companies which file using a prospective test year, are required to file their TRPs in computerized form. As was the case in the 1990 annual access filing, it is our understanding from discussions with industry representatives that all Tier 2 companies can now provide the data in mechanized format. Therefore, all companies which file a TRP must provide the data in computerized form.

50. The Tier 1 historical versions of Charts COS-6 and COS-7 need not be provided in computerized form, since those versions will have been filed on April 2, 1991, as part of the companies' ARMIS reports. The prospective versions of these charts, however, must be filed in computerized form with the TRP. "Hard copy" printed versions of both the historical and prospective versions of Charts COS-1, COS-6 and COS-7 must be included in the TRP and should be aggregated to the tariff entity level.

G. Compliance with the Paperwork Reduction Act

51. In compliance with the Paperwork Reduction Act, we estimate burden-hours and place the OMB form number and date on the formats included with this Order. We also note that this TRP was developed after informal discussions with LECs and other industry representatives and after evaluation of comments filed in response to our *December 10 Public Notice*. By adoption of this Order, we are minimizing the burden on the LECs by several means. This Order deletes obsolete requirements and other requirements which have not proved useful. We note, especially, that we do not require the filing of some historical data which have been filed in previous years, and that carriers will not have to provide access MOU factors on DMD-1. These changes will lessen the burden compared to the 1990 annual access filings. We are relying on data filed in ARMIS for much of the historical cost data, and are requiring that the prospective cost data be filed in a format patterned after the ARMIS filing. We continue to require significantly less data from the smaller LECs, and have thereby reduced the burden of TRP data requirements for many Tier 2 companies. We note that we are not requiring Chart T2DEP from carriers whose depreciation rate is not set by the Commission.

VII. CONCLUSION; PROCEDURAL REQUIREMENTS

52. This Order will be sent directly to all carriers that will file their own access tariffs on April 2, 1991, and a copy will also be sent to NECA. A copy of the Order and all attachments will be available for inspection at the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. While the Commission will distribute copies of the main text of this Order, those parties wishing to obtain copies of Attachments B and C can do so only through the Commission's contractor for public records duplication.

53. Each company should submit its TRP separately from other portions of its tariff filing. Each TRP should be filed in a separate Volume 1-2 accompanying Volume 1 of the Description and Justification. Each TRP should be arranged by study area rather than by chart. Each company should provide an extra copy of the TRP to the Accounting and Audits Division, Suite 812, 2000 L Street, N.W., Washington, D.C. 20036 on or before April 2, 1991. The Commission will provide further details regarding the procedures applicable to the April 2 tariff filing in a future release.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Access Tariff Filing Schedules, CC Docket No. 88-326, FCC 88-283, Report and Order, released Sept. 14, 1988 (*Tariff Filing Deferral Order*).

[2] 47 C.F.R. §§ 61.38 and 61.41 through 61.49. Compliance with the requirements set forth in this Order does not ensure acceptance of carriers' access charge tariffs or replace total support material requirements. Carriers remain obligated to provide adequate supporting documentation for their access charges. For instance, LECs should note additional cost support requirements outlined in Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the Commission's Rules), CC Docket No. 86-182, DA 88-809, released May 31, 1988, at paras. 3-4.

[3] The TRPs should be associated with the calendar year in which the tariffs will become effective. Thus, the TRPs discussed in this Order, which will accompany the April 2, 1991, access tariff filings scheduled to become effective on July 1, 1991, will be referred to as the 1991 TRPs.

[4] *See* Commission Requirements for Cost Support Material To Be Filed with Access Tariffs on October 3, 1986, Mimeo No. 6356, released Aug. 15, 1986 (*1987 TRP Order*); Commission Requirements for Cost Support Material To Be Filed with 1988 Annual Access Tariffs, Mimeo No. 4219, released July 30, 1987 (*1988 TRP Order*); Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Access Tariffs, 4 FCC

Rcd 1662 (1989) (*1989 TRP Order)*; Commission Requirements for Cost Support Material To Be Filed with 1990 Annual Access Tariffs, 4 FCC Rcd 1662 (1990) (*1990 TRP Order).*

[5] *See, e.g.*, Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the Commission's Rules), Order, CC Docket No. 86-182, 4 FCC Rcd 4239 (1989) (*ARMIS Order)*; *Tariff Filing Deferral Order*; Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990); Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order), recon. pending.*

[6] *See* Common Carrier Bureau Solicits Comments Regarding Modifications and Improvements to the Tariff Review Plan, DA 90-1810, Public Notice, Mimeo No. 10921, Dec. 10, 1990 (*December 10 Public Notice).* Comments in response to our *December 10 Public Notice* were filed on December 28, 1990, by Alltel Service Corporation (Alltel), American Telephone and Telegraph Company (AT&T), Lincoln Telephone and Telegraph Company (Lincoln), MCI Communications Corporation (MCI), Rochester Telephone Corporation (Rochester), and United States Telephone Association (USTA).

[7] The RBOCs are Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (Pactel), Southwestern Bell Telephone Company (SWB), and Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone (US West).

[8] *See* Commission Requirements for Cost Support Material To Be Filed with Access Tariffs on March 1, 1985, Public Notice, Mimeo No. 2133, released Jan. 25, 1985 (*January 25 Public Notice).*

[9] *See 1990 TRP Order* at para. 4.

[10] Regulation of Small Telephone Companies, CC Docket No. 86-467, FCC 87-186, released June 29, 1987, *recon. pending* (*Small Telephone Company Order). See* also 47 C.F.R. §§ 61.39(a) and (b), 69.602.

[11] *See* 47 C.F.R. § 69.602 for a definition of the subsets that vote separately for NECA directors.

[12] Actions in pending proceedings might affect tier classifications in subsequent filings. Petitions for reconsideration of the *Small Telephone Company Order* have been filed by Alltel, Century Telephone Enterprises, Contel Corporation, CP National Corporation, Telephone and Data Systems, Inc., and USTA, and an application for review of the *1988 TRP Order* has been filed by Alltel. In its Letter from Counsel, Alltel, to Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, dated December 22, 1987, Alltel raised the same issue, in the context of the Paperwork Reduction Act, that it and the other petitioners raised in their petitions for reconsideration before the Commission.

[13] *See* 47 C.F.R. § 61.38(b)(1).

[14] *See* 47 C.F.R. §§ 69.2(b) and (z).

[15] 47 C.F.R. §§ 61.39(b)(1)(i) and (ii).

[16] Thus, a small telephone company which last filed on April 2, 1989 and used historical data through December 1988 in setting its rates in that filing should use historical data for the period January 1989 through December 1990. Any small telephone company which filed its first access filing in the 1990 annual access tariff filing, and wishes to file using the optional procedures for small telephone companies, must file this year using historical data for the entire period since its last historical period. For example, if the company filed on April 2, 1990 using an historical period which ended on December 31, 1989, the historical period the company should use in this filing is January 1, 1990 through December 31, 1990. *See* 47 C.F.R. § 69.3(f).

[17] *See* 47 C.F.R. § 61.39(b).

[18] Some companies which, on their own, would qualify as Tier 2B companies are classified as Tier 2A companies because they are affiliated with companies that are NECA Subset 2 companies or that have study areas of greater than 50,000 access lines. Companies which would be Tier 2B companies but for such affiliation must use the July 1991 through June 1992 prospective test year and furnish PYCOS data for calendar 1990.

[19] This must have the value 3.3 percent in the Common Line (CL), Traffic Sensitive-Switched (TS), and Special Access (SpAc) baskets, and 3.0 percent in the Interexchange (IX) basket, or, at the companies' option, 1 percentage point higher in each of these baskets. Choice of the higher productivity factor will affect the levels at which sharing and the stabilizer occur in the 1992 annual filing.

[20] *See* 47 C.F.R. § 61.44(b).

[21] *Id.*

[22] *See* 47 C.F.R. § 61.45(c).

[23] Rather, the data is provided for the main rate elements, and at an aggregated level for other rate elements.

[24] *See LEC Price Cap Order. See also* 47 C.F.R. § 69.3(i)(1).

[25] *LEC Price Cap Order* at para. 270.

[26] Thus, Rochester shall use the cost and demand forecasts from its April 2, 1990 filing for each of the entities Rochester is including in its price cap tariff, as adjusted by the Bureau in Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, 5 FCC Rcd 4177 (1990) (*1990 Access Tariff Order)* for its starting rates. The costs and demand from each entity Rochester is including in its price cap tariff shall be summed to develop these starting rates. These starting rates shall be adjusted for the disallowance adjustments made through Annual Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, DA 90-1303, released Oct. 3, 1990 (*October 3 Order),* and for the change in the rate of return. The PCIs, APIs, SBIs, and DS1 and DS3 subindexes shall be initialized at 100 as of July 1, 1990 and the PCIs shall be adjusted for the changes in disallowances made in the *October 3 Order* and for the change in the rate of return.

[27] The format for this Report was adopted in Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), Order, CC Docket No. 86-182, 4 FCC Rcd 973 (1989).

[28] The format for this Report was adopted in Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), Order, CC Docket No. 86-182, 4 FCC Rcd 906 (1989); Errata, CC Docket No. 86-182, 4 FCC Rcd 1815 (1989).

[29] The format for this Report was adopted in Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), Order, CC Docket No. 86-182, 4 FCC Rcd 1040 (1989); Errata, CC Docket No. 86-182, 4 FCC Rcd 1815 (1989).

[30] The format for this Report was adopted in Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), Order, CC Docket No. 86-182, 4 FCC Rcd 4239 (1989).

[31] In 1990, ARMIS chart 43-01 required only historical quarterly data rather than calendar year data. ARMIS chart 43-01 has since been revised to reflect annual data. We are therefore using ARMIS 43-01 for TRP chart COS-1(H).

[32] We note that there are currently under consideration revisions to the ARMIS reports. The version of these reports which the carriers will be required to file in ARMIS is the version which must be used for the TRP.

[33] For instance, settlements were included in actuals, but not in forecasts.

[34] *See 1987 TRP Order* at para. 17; *1988 TR Order* at para. 24; *1989 TRP Order* at para. 37; *1990 TRP Order* at para. 31.

[35] *See* Annual 1987 Acess Tariff Filings, Petitions for Waivers of Filing Requirements, Memorandum Opinion and Order, Mimeo No. 6945, released Sept. 16, 1986 (*1987 Waiver Order*).

[36] Only Charts IND, SUM, and RTE need be summed. The portions of chart RTE which report rates and indexes, of course, need not be summed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies — Transmittal No. 488

Tariff F.C.C. No. 2
Access Services

ORDER

Adopted: February 6, 1991; Released: February 6, 1991

By the Chief, Common Carrier Bureau:

1. On November 9, 1990, the Ameritech Operating Companies (Ameritech) filed Transmittal No. 488 to offer special facilities routing of access services on a general basis. On November 30, 1990, Diginet Communications, Inc. (Diginet), submitted a late-filed petition to reject or, in the alternative, to suspend and investigate Ameritech's transmittal, together with a motion to accept a late-filed pleading (Diginet Motion). Ameritech filed an opposition to Diginet's late-filed pleading on December 10, 1990 (Ameritech Opposition). On December 17, 1990, Diginet filed a reply to Ameritech's opposition. The revisions are scheduled to become effective February 7, 1991.

2. Diginet states that it did not learn of Ameritech's transmittal until November 19, 1990. Diginet Motion at 1. Diginet asserts that its delay in filing was the result of the Thanksgiving Day holiday, the time needed to conduct the necessary legal research and analysis, and the need to consult with its counsel. *Id.* at 2. Diginet argues that the public interest will be served by the Commission's having before it the most complete record possible in order to resolve the issues raised by the tariff. *Id.*

3. Ameritech argues that Diginet received a letter informing it of the tariff filing at least one week before Diginet's petition against the filing was due. Ameritech Opposition at 2. Ameritech states that since the tariff filing does not increase rates or charges or discontinue, reduce, or impair service, Section 61.58(4) of the Commission's rules, 47 C.F.R. § 61.58(4), does not require Ameritech to notify Diginet of the filing at all. *Id.* at 2-3. Ameritech also states that Diginet fails to explain why it was unable to file a motion for extension of time for filing its pleading, and to notify the Commission and Ameritech that such a motion was going to be filed as required by Section 1.46(e) of the Commission's Rules, 47 C.F.R. §1.46(e). *Id.* at 3.

4. Under Section 1.773(a)(2)(ii) of the Commission's Rules, 47 C.F.R. § 1.773(a)(2)(ii), petitions to reject or suspend and investigate Ameritech Transmittal 488 were due no later than November 26, 1990. Diginet's petition was filed November 30, 1990, four days late. We have reviewed Diginet's motion and its reply to Ameritech's opposition and conclude that it has not demonstrated good cause for filing its petition four days late. Therefore, Diginet's motion to accept a late-filed pleading is denied.

5. Accordingly, IT IS ORDERED that the motion to accept a late-filed pleading filed by Diginet Communications, Inc., IS DENIED.

6. IT IS FURTHER ORDERED that the petition to reject or, in the alternative, to suspend and investigate Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 488, filed by Diginet Communications, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-279

In re Applications of

MACON RADIO ASSOCIATES LIMITED PARTNERSHIP	File No. BPH-880421MD
SOUTHEAST COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-880421MO
PAMELA R. JONES	File No. BPH-880421NL
GKT COMMUNICATIONS OF GEORGIA LIMITED PARTNERSHIP	File No. BPH-880421NN

For Construction Permit for a
New FM Station on Channel 222A
in Macon, Georgia

ORDER

Adopted: February 14, 1991; Released: March 5, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On December 6, 1990, Pamela R. Jones filed a petition for extraordinary relief, which was supplemented on December 11, 1990. Thereafter, all the parties including Pamela R. Jones entered into a settlement agreement which Administrative Law Judge Edward J. Kuhlmann approved by *Memorandum Opinion and Order*, FCC 91M-588, released February 14, 1991. Thus, the petition for extraordinary relief is now moot.

2. ACCORDINGLY, IT IS ORDERED, That Pamela R. Jones' petition for extraordinary relief filed December 6, and supplemented December 11, 1990, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-338

In re Applications of

KENNELWOOD BROADCASTING COMPANY, INC.	File No. BPH-870629MU
EXCELSIOR COMMUNICATIONS, INC.	File No. BPH-870603NA
CHASE COMMUNICATIONS, INC.	File No. BPH-870630NB

For Construction Permit for
New FM Station, Channel 233A,
Waco, Texas

Appearances

Timothy K. Brady, on behalf of Kennelwood Broadcasting Company, Inc.; *Maurita K. Coley* and *Yvonne Rena Bennett*, on behalf of Excelsior Communications, Inc.; and *Robert Lewis Thompson* and *Howard J. Barr*, on behalf of Chase Communications, Inc.

DECISION

Adopted: February 15, 1991; Released: March 6, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Member BLUMENTHAL issuing Concurring Statement Dubitante.

Board Member ESBENSEN:

1. Before the Review Board is the *Initial Decision*, 5 FCC Rcd 6657 (1990) (I.D.), of Administrative Law Judge Joseph Chachkin (ALJ), as well as the exceptions (filed December 17, 1990) and replies (filed January 16, 1991) of all the captioned applicants. This proceeding was heard on the "standard comparative" issue, and our decision here turns solely on that issue,[1] pursuant to the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*1965 Policy Statement*). The applicants who did not prevail in this proceeding (Excelsior Communications, Inc. (Excelsior) and Chase Communications, Inc. (Chase)) requested that the Board, pursuant to 47 CFR §1.227(c), in its discretion, hear oral argument. However, based upon our review of the entire record, the Board finds that oral argument is unnecessary to resolve this proceeding, and affirms the award of the construction permit at issue to Kennelwood Broadcasting Company, Inc. (KBC). As will be demonstrated, with KBC receiving 100% integration credit, enhanced by 50% female ownership, Chase, which claims no minority or female enhancement credit, and Excelsior, which concedes it seeks, at best, only 75% full-time integration credit, cannot prevail in this proceeding.

KENNELWOOD BROADCASTING CO., INC.

2. KBC is a Texas corporation, with 1,000 authorized shares of common voting stock. All shares are currently issued and outstanding to the sole shareholders of KBC: Jerry Lenamon (500 shares) and his wife, Loy Lenamon (500 shares) (Tr. 167-168; KBC Exh. 2 at 1). Loy Lenamon is Secretary, Treasurer and a director of KBC. Mr. and Mrs. Lenamon both propose to integrate full-time into the management and operation of the station. Mr. Lenamon will serve as General Manager, and his duties will include overall supervision of all phases of station operation, including the station's programming and technical operation. Mrs. Lenamon will serve as Business Manager, with her duties including supervision of the station's business and financial affairs, sales, traffic, billing, bookkeeping, purchasing, personnel matters and public relations. Together with her husband, Mrs. Lenamon will oversee the ascertainment of community needs and interests and formulate responsive programming to meet those needs and interests, and will implement the station's EEO Program (KBC Exh. 23).

3. Mr. Lenamon was born in Waco, Texas in 1950 and has remained a Waco resident (except for a six month absence while he was in the Navy) (KBC Exh. 2 at 2). Mrs. Lenamon was born in Waco, Texas in 1949 and has remained a Waco resident (except for a four month absence in 1972) (KBC Exh. 3 at 3). Both have been active in civic affairs of the community. I.D., paras. 9, 11-12. Neither KBC, nor either of its principals, have any interest in any medium of mass communication. I.D., para. 13. KBC proposes to install an auxiliary power source at its studio and transmitter sites. I.D., para. 14. The ALJ concluded that (I.D., para. 58):

> KBC is entitled to 100% quantitative integration credit for the proposed fulltime integration of each of its two shareholders, Loy Lenamon (50%) and Jerry Lenamon (50%). KBC is also entitled to 50% gender credit for the integration of Loy Lenamon, based upon her female status. KBC is also entitled to substantial local residence credit for the lifelong residence of both of its principals within the community of license. Likewise, KBC receives enhancement credit for the civic activities of each of its principals in the community of license.

4. The principal (and decisionally-significant) exceptions of both Excelsior and Chase are leveled at the Lenamon's "commitments" to other business interests, claiming that the Lenamons cannot effectuate their full-time proposal for the radio station. More specifically, at the time of hearing, the Lenamons owned and operated a local small business, Lone Star Safari (a travel/camping goods store).[2] In its pre-hearing "Statement for the Record" (filed September 11, 1989) (Chase Exh. 4) concerning KBC's proposed integration, both KBC principals disclosed that they both would be integrated full-time into the day-to-day operation of the station. It was also disclosed that Mr. Lenamon was then "currently engaged

fulltime in the start-up phase" of Lone Star Safari (which had then been in operation for some 60 days), but "in the event [KBC's broadcast] application is granted, he will terminate his employment and day-to-day involvement . . . through either hiring a full-time employee to replace him, or if necessary, selling the business, so as to be in a position to fulfill his [broadcast] integration proposal." *Id.*, at p. 2. An identical disclosure and pledge was made with respect to Mrs. Lenamon. *Id.*, at p. 3. Thereafter, in KBC's direct written case exhibits (KBC Exhs. 2-3), identical pledges were repeated, and the Lenamons indicated that, subsequent to terminating their involvement with Lone Star Safari, and if that business was not, in fact, sold, they would "devote no more than 3 hours per week to overseeing its operation." KBC Exh. 2 at 2; Exh. 3 at 2. With respect thereto, the ALJ found (I. D., para. 6):

> In the event KBC's application is granted, Mr. and Mrs. Lenamon will terminate their employment and day-to-day involvement with this business (KBC Exh. 2, 3). The day-to-day responsibilities will be turned over to a full-time employee (KBC Exh. 2; Tr. 58, 73-74). In this regard, the store requires the Lenamon's full-time involvement because the business was just recently opened. However, once the store is established, which the Lenamons believe will take about a year, the store can be successfully maintained by a full-time employee plus part-time or seasonal sales help (Tr. 137, 144-45). Mr. and Mrs. Lenamon will devote no more than 3 hours per week, each, to overseeing its operation. Such oversight will consist of reviewing the store's books to see how the store was doing financially and discussing such matters with the manager (KBC Exh. 2; Tr. 88, 138-39, 155). The Lenamons are also prepared to sell the business should its continued operation without their day-to-day involvement prove not to be feasible. However, based upon the current operations and revenues of this business, the sale of the business is believed to be unnecessary (KBC Exh. 2, Tr. 74, 190).

5. Mr. and Mrs. Lenamon also own Kennelwood Investments which, in turn, owns one building and one unimproved parcel of land. With respect to this interest, the ALJ determined that (I.D., para. 7):

> Ms. Lenamon currently devotes approximately 10 hours per week to managing Kennelwood Investments, a real estate business, which she owns with her husband. Kennelwood Investments owns commercial property . . . . In the event KBC's application is granted, she will continue to manage the family owned business but will reduce the amount of time she devotes to these activities to a total of 2 hours per week by contracting out the bookkeeping, which she currently does herself (KBC Exh. 3; Tr. 69, 96).

Both exceptors challenge the ALJ's findings, and claim that Mr. and Mrs. Lenamon must devote significant time to their other business ventures (especially Lone Star Safari), and have not demonstrated how they can effectuate their full-time integration pledges to the proposed broadcast facility.

6. *Discussion re KBC*: The Commission recently reiterated in *Royce International Broadcasting*, 5 FCC Rcd 7063 at §7 (1990), that every applicant bears the burden of proof under the standard comparative issue to demonstrate persuasively their integration proposals, particularly if other interests might conflict:

> It is axiomatic that integration credit is due only when "the applicant sets forth a specific integration proposal; the applicant adheres to that proposal; and there is reasonable assurance that the plan will be carried out." *Coast TV*, 5 FCC Rcd 2751, 2752 ¶ 8 (1990). *See also Bradley Hand & Triplett*, 89 FCC 2d 657, 662-663 ¶ 8 (Rev. Bd. 1982).

As the Board earlier explained in *Knoxville Broadcasting Corp.*, 103 FCC 2d 670, 687-688 (Rev. Bd. 1986):

> In practice, it lies with the applicant advancing an "integration" proposal to allay any serious questions which may bear upon likely effectuation of that proposal, despite strong circumstantial evidence raising inevasible doubts. Sometimes an applicant is successful in dispelling the serious doubts that have arisen. *See, e.g., Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 586-589 (Rev. Bd. 1982) (restoring integration credit rejected by ALJ) (majority opinion), *recon. denied*, FCC 82R-77, released December 22, 1982; *aff'd*, FCC 83-415, released September 21, 1983 (Comm'n), *aff'd mem. sub nom. Blake-Potash Corp. v. FCC*, No. 83-2112 (D.C. Cir. filed April 26, 1985). Sometimes an applicant is, on the slant of the record, unpersuasive, *See, e.g. KIST Corp.*, 99 FCC 2d 173, 183 n. 22 (Rev. Bd. 1984), *modified on other grounds*, FCC 85-512, released September 24, 1985 (Comm'n), *appeal pending sub nom. United American Telecasters, Inc. v. FCC*, Nos. 85-1663, etal. (D.C. Cir. filed October 15, 1985). And, as suggested by the court's accompanying memorandum in *Blake-Potash*, *supra*, "substantial evidence" on the question of the likelihood of the effectuation of a particular applicant's "integration" proposal may support, legally, either predictive judgment.

7. The exceptors challenge virtually every aspect of KBC's integration proposal and the ability of its principals to effectuate their proposed full-time duties at the station. Chase claims there is "substantial conflict" in the written integration statements, direct case exhibits, and oral testimony of the KBC principals. However, our review of the record reveals otherwise. For example, Chase reiterates its contention, rejected by the ALJ (*see* Tr. 37-42; 151), that a variance exists between KBC's integration statement (which indicated that in the event KBC's application was granted, the Lenamons would terminate their employment and day-to-day involvement with Lone Star Safari), and their direct written testimony (which claimed that each of the Lenamons proposed to devote no more than 3 hours per week to overseeing the operations of that entity). However, we find that the Lenamons' hearing testimony, indicating that they would devote no more than three hours a week to " *overseeing* " the operations of the business does not undermine their commitment to terminating their employment and day-to-day involvement in

Lone Star Safari, while devoting no more than three hours per week to overseeing the performance of the persons hired to replace them in the day-to-day operation.

8. Chase also argues that Ms. Lenamon's testimony that she would devote no more than three hours per week to overseeing Lone Star Safari is contradicted by the evidence. Chase relies upon Ms. Lenamon's testimony that she "might" continue to do the bookkeeping for Lone Star Safari "if it didn't take too much time." However, the record evidence regarding the amount of time required to complete the bookkeeping is Ms. Lenamon's estimate that it requires "probably two hours a week or so." (Tr. 45). Nevertheless, Chase infers that, since she proposes to reduce (from ten to two hours) her involvement in Kennelwood Investments "by contracting out the bookkeeping," more than eight hours per week would thus be required for bookkeeping for Lone Star Safari. However, no record evidence suggests that Ms. Lenamon currently devotes eight hours per week to that activity. In fact, Ms. Lenamon testified that she currently devotes little more than two hours per week to bookkeeping for Lone Star Safari (Tr. 45, 69). Thus, Chase's contention that there exists "an irreconcilable conflict" between Ms. Lenamon's pledge to devote no more than three hours per week to overseeing the operations of Lone Star Safari, and her testimony that she "might" continue to do its bookkeeping, rests upon an unsupported inference.

9. In *Naguabo Broadcasting Company*, FCC 91R-10, released February 19, 1991 (at n. 63; emphasis added), the Board again observed that:

> The Board's routine practice is to find that generalized promises to "diminish" the time spent on a *significant* business interest is insufficient. *Leinenger-Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1181 (1988); *Ft. Collins Telecasters*, 103 FCC 2d 978, 985-86 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1780 (1987). In that regard, a blanket pledge to hire more employees and diminish hours spent is not enough; we have no way to check afterwards, and were we to accept such a promise where significant business interests remain, all comers would receive full-time credit.

Here, the record is uncontroverted that Lone Star Safari required only a minimal investment by the Lenamons. Mrs. Lenamon testified that their bank line of credit to meet their investment was minor in nature, and was substantially less than even half the funds required for their proposed station. *See* Tr. 59-60; 156. Indeed, Chase concedes it is the "soul-burning desire" of Mr. Lenamon to own and operate a radio station (Chase Exceptions at p. 3), and nothing in the record demonstrates that Lone Star Safari would be the pre-eminent business interest of KBC's principals (especially at the expense of a broadcast facility). Additionally, Lone Star Safari is demonstrably not comparable to the "significant" business interests found to present potential conflicts in other proceedings where integration credit has been denied. For example, in *Naguabo* a principal's proposal to retain two ongoing business interests (an automobile service facility and an audio equipment business, which grossed in excess of $450,000 annually), and to which he devoted full-time, was sufficient basis to deny full integration credit. In *Leinenger-Geddes*, integration credit was denied to a principal/attorney who did not intend to give up his trial practice; was founder and principal shareholder in ten-member law firm; and was a member of the State Legislature. Similarly, in *Ft. Collins*, integration credit was denied a principal who worked four or five days per week at his 100%-owned multiple furniture outlets (with 30-plus employees and annual sales in excess of $1,000,000), and who did not indicate he would cease or cut-back the amount of time he devoted to this significant business interest.

10. On the other hand, where there has been full compliance with the Commission's expectation that applicants with outside employment or other interests demonstrate how they *will*, in fact, accommodate those activities so as to meet their full-time commitment to the station, full integration credit will be awarded. *See Cuban-American Ltd.*, 5 FCC Rcd 3781, 3785 (1990). As the Board recently held in *Achernar Broadcasting Company*, 5 FCC Rcd 6309, 6312 (Rev. Bd. 1990) (applicant with multiple business interests in different areas of the country awarded full integration credit):

> [The applicant's principal] expressly testified that while he now spends ten to twenty hours a week [at his business] he would delegate day to day activities to his managers and thus reduce his commitment to "no more than ten hours a week," and, as to his two [other businesses], he would continue his present practice of spending two to four hours a week on their oversight, but even that time could be eliminated if necessary . . . Thus, [his] total work week at most will be in the fifty to sixty hour range, which does not approach the seventy to eighty hour work commitments which the Commission has refused to credit. *See Caldwell Broadcasting Corp.*, 100 FCC 2d 115, 125 (Rev. Bd. 1985), *rev. granted on other grounds*, 104 FCC 2d 438 (1986) (80 hour proposal not credited); *Northern Sun Corp.*, 100 FCC 2d 889, 892 ((Rev. Bd. 1985), *rev. denied*, FCC 86-135, released March 28, 1986 (70 hours "teeters on the outer limits of credibility"); *Bradley, Hand & Triplett*, 89 FCC 2d 657 (Rev. Bd. 1982) (50-60 hour proposal credited); *Berryville Broadcasting Co.*, 70 FCC 2d 1, 11-12 (Rev. Bd. 1978) (70 hour proposal discredited.).

11. Here, we have reviewed the entire record, including the testimony of the Lenamon's, and agree with the ALJ that there is no evidence "to cast any serious doubt" on the KBC principals' ability to eliminate or curtail their current conflicting time commitments to their other business interests. We concur with the ALJ that the exceptors' arguments are "built on nothing more than speculation and surmise" and fail to undermine the Lenamons' ability to effectuate their integration commitments. On the record before us, we cannot determine that the Lenamons' other minor business interests, plus their full-time commitment to the radio station, would require more than (or even close to) "the fifty to sixty hour range" approved in *Archenar*. KBC has demonstrated that its principals can and will effectuate their integration proposals, and we affirm the ALJ's award of 100% integration credit, other qualitative credits, and comparative enhancements (including 50% female preference for Mrs. Lenamon).

CHASE COMMUNICATIONS, INC.

12. Chase is a Texas corporation with two shareholders: James P. Chase III (1,000 shares of Class A common voting stock), and his brother, Thomas G. Chase (1,000 shares of Class B common non-voting stock). James Chase proposes to be the sole principal integrated into ownership and management of the station, and will be full-time General Manager (I.D., para. 42). James Chase resided in Waco, Texas from his birth (in 1951) until 1969, when he left the area to attend college (through 1973). He apparently then returned to Waco, but left the area again in 1977, and remained away until 1981. (I.D., para. 43). Neither Chase, nor either of its two shareholders, have any attributable media interests (I.D., para. 53), and Chase proposes to install an emergency power source (I.D., para. 54). James Chase has been active in Waco civic affairs since 1983 (but some of these activities post-date the filing of Chase's application; *see* I.D., paras. 44-46).

13. Both KBC and Excelsior attack the *bona fides* of the brothers Chase, claiming that non-voting shareholder Thomas G. Chase has been impermissably active in Chase's application. However, we need not reach these exceptions because, even with Chase receiving full integration credit, it cannot prevail over KBC in light of the dispositive female enhancement credit awarded KBC principal Loy Lenamon[3] (in addition to the conceded longer local residence of both KBC's principals). Therefore, in ultimately comparing Chase with KBC, we hold that KBC is entitled to a "very slight" preference over Chase for longer term local residence. *Marlin Broadcasting of Central Florida*, 4 FCC Rcd 7945, 7955 (Rev. Bd. 1989), *recon. denied*, 5 FCC Rcd 322 (1990), *review denied*, 5 FCC Rcd 5751 (1990), *recon. dismissed*, 5 FCC Rcd 7446 (1990); *see also Vacationland Broadcasting Company, Inc.*, 97 FCC 2d 485, 496 (Rev. Bd. 1984) (subsequent history omitted). Chase, on the other hand, is entitled to credit for "broadcast experience," a factor of minor significance, *see 1965 Policy Statement, supra*, 1 FCC 2d at 396; *Joe L. Aldridge*, FCC 91R-15, released February 20, 1991. However, KBC is entitled to an enhancement credit for 50% female ownership, *see Radio Jonesboro, Inc.*, 100 FCC 2d 941 (1985); *Marlin Broadcasting, supra*, 4 FCC Rcd at 7955 and 5 FCC Rcd 5753 n. 10; *William M. Piner*, 4 FCC Rcd 5100 (Rev. Bd. 1989), which is a dispositive factor in this proceeding. Thus, we hold that, as between KBC and Chase, both applicants are equal with respect to proposed integration into ownership/management, local civic activities, diversification, and auxiliary power. However, KBC's slightest preference for longer, continuous local residence, *plus* 50% female enhancement credit, outweigh Chase's credit for broadcast experience, and must result in KBC being preferred over Chase. *See Swan Broadcasting Limited*, FCC 90R-122, released January 3, 1991 (gender preference, standing alone, outweighs past broadcast experience credit); *Joe L. Aldridge, supra.*

EXCELSIOR COMMUNICATIONS, INC.

14. Excelsior is a Texas Corporation with four equal voting shareholders (25% each): Dr. Arthur T. King, Marilyn O. Marshall, Alvan L. Pollard, Sr., and Eric H. Hooker. All are officers and directors of Excelsior. (I.D., para. 15). Dr. King has resided within the proposed principal city contour (3.16 mV/m) for the past 7 years (I.D., para. 19). Marilyn O. Marshall lives outside the proposed service area of the station, but claims she will move to Waco if Excelsior's application is granted (I.D., para. 33). Alvan Pollard has lived outside the city limits of Waco (but within the proposed principal-city contour) for the past 15 years. Prior to that time (for 3 years) he lived within the Waco city limits (I.D., para. 23). Eric H. Hooker has lived in Waco for the past 12 years. All principals of Excelsior are minority-group members, and none (nor the corporate-entity applicant) has any interest in any medium of mass communications. Excelsior proposes to install auxiliary power, and the shareholders have been active in civic activities.

15. The ALJ held that Excelsior was entitled, at best, to only 25% quantitative integration credit for the proposal of Marilyn O. Marshall (full-time General Manager), because two of the remaining shareholders have other conflicting interests which would preclude the award of full-time integration credit, and one shareholder (Pollard), at best, proposes only part-time integration. Marshall's proposal was enhanced by female and racial preferences, proposed future residence, and past civic involvement (I.D., para. 56).

16. *Discussion re Excelsior* : Apparently content with the ALJ's resolution of Excelsior's proposal, neither KBC nor Chase has filed any exceptions in this regard. Excelsior, however, argues that the ALJ erred in not awarding full-time integraton credit to shareholders King and Hooker (in addition to Marshall), resulting in a claim for a maximum 75% full-time integration credit, and 25% part-time (or, as Excelsior labels it, "substantial-time" credit for Pollard). That is, Excelsior, at most, seeks only 75% full-time integration credit.

17. Without reaching the other extant exceptions of Excelsior, its concession that it is entitled, at most, to only 75% full-time integration credit, is dispositive here. Full-time participation in station operation by owners is a "factor of substantial importance" and to the extent "that the time spent moves away from full-time, the credit given will drop sharply . . . ." *1965 Policy Statement, supra*, 1 FCC 2d at 396. And, as the Commission has indicated, a quantitative differential of 12.5% integration credit cannot be overcome, even by the qualitative attributes of competing applicants. *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 (1989) (subsequent history omitted), citing *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 (Rev. Bd. 1983) (subsequent history omitted). Therefore, Excelsior could not, in any event, prevail over KBC (which has been awarded 100% full-time integration credit), or even Chase. Thus, Excelsior places a distant third in this proceeding; Chase places second; and KBC must prevail. The grant of KBC's application will best serve the public interest.

18. ACCORDINGLY, IT IS ORDERED, That the applications of Excelsior Communications, Inc. (File No. BPH-870603NA) and Chase Communications, Inc. (File No. BPH-870603NB) ARE DENIED, and the application of Kennelwood Broadcasting Company, Inc. (File No. BPH-870629MU), for a new Class A FM station at Waco, Texas, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Chase attempted to raise a basic financial qualifications issue against KBC before the ALJ because "KBC has failed to reasonably or seriously attempt to ascertain the costs of construction and operating its proposed station." (Chase Exceptions at p. 25). In light of the ALJ's issue denial, Chase renews this argument before the Board. These exceptions will be denied. Having reviewed the record, we find that the ALJ's reasons for denying the requested issue were emminently sound. In his *Memorandum Opinion and Order*, FCC 90M-462, released March 7, 1990, the ALJ declared (at para. 2; footnote omitted):

> Chase's request for a financial certification issue is premised upon its unsupported contention that KBC did not reasonably or seriously attempt to ascertain construction and initial operating costs prior to filing its application. Chase's request for an issue rests solely on selected portions of the deposition testimony of KBC's principals, ignoring portions of Mr. Lenamon's testimony which run counter to Chase's contentions. Thus, in arguing that KBC failed to ascertain construction costs, Chase omits the critical testimony of Mr. Lenamon that he arrived at his cost estimates on the basis of discussions with his technical consultant (Dep. Tr. 13, 17-18). Significantly, Chase did not inquire further at Mr. Lenamon's deposition concerning his discussions with his technical consultant, Dwight Magnuson. Chase's contention that KBC did not prepare an operating cost estimate is also unsupported and, in fact, rebutted by a reading of Mr. and Mrs. Lenamon's entire deposition. In sum, Chase has failed to establish a *prima facie* showing that KBC failed to seriously and reasonably estimate its costs of construction and initial operation. Furthermore, the declaration of Mr. Lenamon and Magnuson, attached to KBC's opposition, demonstrate affirmatively that KBC reasonably and seriously ascertained its construction and oprating costs prior to filing its application.

[2] KBC filed its instant application in June 1987, and Lone Star Safari commenced business in late 1989 (I.D., para. 6).

[3] In its Exceptions, Chase also argues that the ALJ erred in awarding a "slight preference" to KBC over Chase on the criteria of local residence (I.D., para 67), "in light of Jim Chase's lifelong residence" in Waco (Chase Exceptions at p.2) because "[i]n today's fast-paced world, where local needs and problems are hardly static, it would be arbitrary to award a past local residence preference . . . ." Chase also argues that the "female preference" awarded KBC principal Loy Lemanon is unconstitutional (*id.*, at p. 2). Chase, however, cites no extant, valid precedent for either view.

STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL CONCURRING *DUBITANTE*

I write separately to reinforce a long-held view, *see Central Texas Broadcasting Co., Ltd.*, 90 FCC 583, 599-604 (Rev. Bd. 1982) (dissenting statement),[1] that the Board should be chary of accepting full-time integration pledges from principals proposing to simultaneously retain outside business interests. And, in accepting or rejecting integration pledges, we must not be seen as inconstant in applying the Commission's standards, as in the recent *Cuban-American Limited*, 5 FCC Rcd 3781, 3784-3785 (1990) (reversing Board's "disparate treatment" of integration pledges).

In deciding whether to accept or reject an integration pledge, I invariably revert to the principle first espoused by the Board in *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969), one of the first cases decided after the 1965 *Policy Statement*[2] "codified" integration as a top priority. In denying even slight (25% part-time) integration credit to applicant principals proposing to retain outside business interests, the *Blancett* Board prudently established that " *the very existence* of [these] other interests renders questionable [the] commitments in the absence of an *additional showing* by the applicant of the reliability its integration proposal . . . ." 17 FCC 2d at 230. As to the sufficiency of that " *additional showing*, " and believing as did the *Blancett* Board that in the forests of the Commerce Clause wherein we husband fidelity follows finances, we have consistently rejected as inadequate simple promises to reduce time now spent full-time on an enterprise and to supplant entrepreneural oversight with (hypothetical) employees. *See ante* paras. 9-10 (and cases cited therein); *compare also, e.g., Blancett with Renee Marie Kramer*, 5 FCC Rcd 563 (Rev. Bd. 1990) (integration credit granted where attorney pledges to terminate practice) and *Naguabo Broadcasting Co.*, FCC 91R-10, released February 19, 1991 (integration credit granted where partner manages outside interest).

By those standards, the grant of full-time integration credit to *both* KBC principals, who jointly initiated in 1989 a retail business from which they have not pledged unqualifiedly to withdraw, is borderline at best. Unfortunately, the record seems not to reveal clearly the size of the subject retail enterprise, *compare Naguabo Broadcasting* at n. 63, nor the financial investment and obligations associated therewith.[3] Though it seems that this Waco FM station will be the greater investment, there is little assurance that at least *one* of the KBC principals will not cover the retail business while the *other* concentrates on the station. Under these circumstances, a full-time grant to *both* KBC principals could be viewed as generous, even naive.

For lack of a clearer record, I withhold a dissent; but, *pari causa*, enjoy little confidence in the legal underpinning of the decision to minimize an ongoing business interest.[4] The majority has done its best, and one can only hope it will not again be whacked in Waco (*see supra* note 1).

FOOTNOTES TO STATEMENT

[1] In *Central Texas*, I objected to the award of full-time (and, as here, dispositive) integration credit to a Waco banker who proposed to retain his banking interests, but "reduce" the time spent on those interests to manage a broadcast station. To no

great surprise, and as observed by Board Member Esbensen in *Anchor Broadcasting Limited Partnership*, 5 FCC Rcd 2432, 2445 (Rev. Bd. 1990) (separate statement) (subsequent history omitted), the *Central Texas* banker awarded the Waco permit over his well-qualified opponents sold the station shortly after the court appeals stage because, as explained to the press at the time of sale, the banker "was on 'two career paths,' and the broadcast business took more time than he had to devote to it." *Central Texas Broadcasting Co., Limited, ASSIGNOR*, 64 RR 2d 332, 333 (Video Services Div. 1987).

[2] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

[3] The lack of a clear record on the size of the retail business is the responsibility of both KBC and its opponents. Under the standard comparative issue, this data was relevant to the KBC integration pledge.

[4] Both the ALJ and the majority find that KBC's opponents have supplied insufficient evidence to "cast doubt" on the pledges of KBC's principals (*see ante* para. 11), but the evidentiary burden is on the applicant (*see ante* para. 6).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-403

In re Application of

EVANSVILLE SKYWAVE, INC. File No. BPH-870430OK

For Construction Permit for a New
FM Station on Channel 298A
at Evansville, Indiana

Appearances

Donald J. Evans and *Theresa S. Zeterberg* on behalf of Evansville Skywave, Inc. and *Y. Paulette Laden* on behalf of the Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD J. KUHLMANN

Issued: February 21, 1991; Released: March 5, 1991

1. Skywave is the only remaining applicant of seven that were designated for hearing on August 4, 1988. *Randolph Victor Bell*, 13 FCC Rcd 5365 (1988). The following issues about Skywave's qualifications will be decided in this decision:

> 1. To determine whether Skywave has misrepresented facts that it is a *bona fide* two-tiered stock corporation and/or that Ms. Sondra Matthews is the real party in control of the applicant, and, if so, the effect thereof upon its basic qualifications.
>
> 2. To determine whether Skywave is financially qualified to construct and operate the proposed Evansville, Indiana FM Station.
>
> 3. To determine whether Skywave has misrepresented facts or lacked candor in certifying that it is financially qualified to construct and operate the Evansville station and, if so, to determine the effect thereof upon its basic qualifications.
>
> 4. To determine whether Sondra Matthews or Leon Perkinson misrepresented facts or lacked candor in their deposition testimony and, if so, the effect thereof upon the basic qualifications of Skywave.
>
> 5. To determine in light of the evidence adduced pursuant to the foregoing issues, whether Skywave's application should be granted.

2. A prehearing conference was held on November 16, 1988. Tr. 1-18. Hearing sessions were held on August 13 and 14, 1990. Tr. 165-278, 280-306. The record was closed on August 14, 1990. *Memorandum Opinion and Order*, FCC 90M-2597, released August 22, 1990. Proposed findings were filed on October 26, 1990. No replies were filed.

FINDINGS OF FACT

3. The four issues about Skywave's qualifications were raised by Tri-State Development and Communications Corporation of Evansville, Inc. (Tri-State) before Tri-State agreed to a settlement for a payment conditioned in substantial part on Skywave receiving a grant.

4. In fact, Tri-State and Skywave agreed in August 1989 to give up their pursuit of this frequency and they asked the Commission to award the facility to a non-party, Walter Threadgill, who, it was claimed, would organize Fed City Communications, Inc. to become the licensee. Because the Commission does not permit a third party grant in initial licensing cases, the settlement agreement was rewritten. The original agreement provided that Threadgill would pay Skywave and Tri-State $175,000 each and he would receive the construction permit. The parties continued to search for a way that Threadgill or Fed City could receive the grant and not violate the Commission's prohibition. Under an agreement, filed March 21, 1990, Fed City would have been allowed to obtain 49% of Skywave for $25,000; Fed City agreed to finance the proposal; and had the right to designate one of three Skywave directors. The agreement provided that six months after the station was "operational" Fed City would have the right to purchase the remaining 51% or Skywave could demand or put its 51% interest to Fed City. If Fed City takes control then it will pay Tri-State $100,000 and Skywave an additional $250,000. If it does not take control, then Skywave must pay Tri-State an additional $75,000. The Bureau urged disapproval of this scheme because Skywave did not retain an option to operate the station. The Bureau concluded that it was still apparent that the applicants had no interest in operating the station.

5. The parties then said that they would "reform" the agreement and Skywave would have the right to buy out Fed City after Fed City had exercised its option. Skywave would reimburse Fed City for all of its investment and pay Fed City a premium. The addendum, which was filed on April 13, 1990, provided that after Fed City exercised its option, Skywave would have 10 days in which to call Fed City's 49% interest, and seven days to pay for that interest. That interest would be valued at three times its purchase price and double the amount Fed City had provided to build and operate the station. In addition, Skywave would undertake Fed City's obligation to Tri-State. Eventually, the time for payment was extended from seven days to 30 days. The Bureau believed that the 30 day payment time at least made Skywave's option a possibility. The agreement was changed again to provide that Fed City could exercise its option to acquire 51% after the station had "operated" for one year after program test authority was granted, and not later than fifteen months after program test authority. The negotiations for those changes were undertaken by the Bureau and a local citizen of Evansville. All of these facts are a prelude to this hearing which is necessary for the settlement to be effectuated.

Issue 1: Whether Sondra Matthews is in control of the applicant

6. Skywave is an Indiana corporation with one common stockholder, Sondra Matthews. Skywave Exh. 1, at 1, Attach. 1, at 2. There is one preferred stockholder, Skywave Communications Corporation (SCC). The common stock has full voting rights. Skywave Exh. 1, Attach. 1, at 2. The preferred shares are nonvoting shares except under certain circumstances. *Id.* Skywave Communications Corp. has the option after May 1, 1993 to require that Skywave purchase its shares at fair market value. If Skywave is "unable to comply" by purchasing SCC's shares, then SCC may convert its shares to voting shares. *Id.*, at 3.[1] The split in equity was intended to be 25% for Ms. Matthews and 75% for SCC. If the shares are converted, Skywave Communications Corp. would control. *Id.* All shareholders may vote on changes to the bylaws. *Id.*, Attach. 1, at 5.[2]

7. Ms. Matthews heard that the frequency was available in the spring of 1986 but she took no action to apply. "[S]hortly thereafter" Lee Perkinson, the President of SCC, contacted her by telephone about applying with SCC. Skywave Exh. 1, at 2. Mr. Perkinson told her that the investors in Skywave Communications Corporation would pay for pursuing the application and that they were looking for someone local to participate with them in applying for the Evansville facility. They agreed after several telephone calls to pursue the application. *Id.* Ms. Matthews received 25% of the equity and SCC 75%. *Id.*

8. SCC had already hired engineers to locate an antenna site when Ms. Matthews decided to join with SCC to seek this frequency. Skywave Exh. 1, at 3; Tr. 206-08. Ms. Matthews claims she secured permission from the site owner to use the land which Skywave proposes for its site. Skywave Exh. 1; Tr. 208-09. In actual fact, her participation amounted to giving the site owner a form letter to sign which was given to her by Mr. Perkinson. Tr. 209. Ms. Matthews then mailed the letter to SCC. *Id.* But Ms. Matthews did not get the proper signatures. She does not know how but Mr. Perkinson discovered that other people owned the land. He told her about his discovery. While Ms. Matthews believed that she should prepare a letter for new signatures, before she could do it, Mr. Perkinson told her it had already been taken care of. Tr. 210-11.

9. Ms. Matthews did not have any part in determining what the rights and obligations would be in the articles of incorporation and by-laws but someone from Phillip Kappes law office went over them with her in April 1987. Skywave Exh. 1, at 3; Tr. 212. Mr. Perkinson supplied both documents to her and they were prepared by or at the direction of Phillip Kappes, an Indianapolis lawyer, who is also an SCC stockholder. Skywave Exh. 1, at 3; Tr. 230. Ms. Matthews did open a bank account for the applicant and she represented that she obtained a letter from Bank One, Indianapolis, Indiana, which purportedly promises to lend money for the proposal. Skywave Exh. 4; Tr. 213, 214. She claimed that she arranged for the loan (Tr. 214-15) but it was Mr. Perkinson who told her what bank to contact and who to contact at the bank. Tr. 215. Ms. Matthews claims she provided Bank One Vice President and Senior Corporate Loan Officer Anthony P. Schlichte with financial information about her finances and what it would cost to construct and operate the station. Tr. 216-17. Mr. Schlichte, when asked about Ms. Matthews' representations, said he did not recall receiving any financial information from Ms. Matthews and that the loan letter was issued because he was familiar with the SCC stockholders from a previous loan they made to finance a cellular telephone business. Tr. 288-89; 292; Skywave Exh 4, at 4.

10. Ms. Matthews arranged to have notice published when Skywave's application was filed. Tr. 217. Although in this she was assisted by her counsel. *Id.*

11. Ms. Matthews heard about Skywave's engineer, corporate lawyer, and communications counsel from Mr. Perkinson in 1986. Tr. 180. She claimed she "retained" them to work on the proposal. Tr. 181-82. However, she claimed that Mr. Perkinson had retained them when she was deposed. Tr. 183. In fact, the engineering firm had been hired to find a site before she knew about SCC's plans. Tr. 185, 186, 296. She never worked out payment or time schedules with either the law firm or the engineering firm that did the work for Skywave. Tr. 188. She never asked the law firm or the engineering firm what their fees would be. Tr. 189, 190. Initially, SCC even paid the engineers' bills. Tr. 191. Ms. Matthews said that Mr. Perkinson contacted the applicants' communications firm, McFadden, Evans & Sill. Skywave Exh. 1, at 5. The firm then contacted her and it was during that call that it was "more or less assumed" that they would prepare Skywave's application, she said. *Id.*

12. In the record (MMB Exh. 1, at 231) there is a letter from Ms. Matthews to L. R. Perkinson at SCC about site acquisition and engineering fees. Ms. Matthews states in the letter that because Skywave did not have a bank account she wanted SCC to pay the bills and Skywave would later reimburse SCC. The letter is undated but it carries the typist's notation SM:sw. Ms. Matthews could not explain why the letter was not dated. She claimed she typed the letter but that the contents of the letter were provided by Mr. Perkinson. Tr. 192. She just made up "sw" to make it look like she had a secretary, she said. Tr. 192. After she answered a few more questions Ms. Matthews conceded that Mr. Perkinson had sent her the letter all prepared and she just signed the letter. Tr. 193.

13. Ms. Matthews does pay all of Skywave's bills out of an account she established with money provided by SCC. Moreover, Ms. Matthews claims that once the application was filed she had infrequent conversations with Mr. Perkinson. She represents that she participated in all settlement negotiations, although she did confer with Mr. Perkinson when more money was needed "beyond [SCC's] original undertaking." Skywave Exh. 1; MMB Exh. 1, at 7.

14. Mr. Perkinson said he was put in contact with Ms. Matthews by someone. He did not name the person. Skywave Exh. 3. The only reason Mr. Perkinson gave for selecting her was that the person "recommending" her said she had a media background. *Id.* Ms. Matthews is the majority owner of a bi-weekly newspaper which is directed at the black community in Evansville. Skywave Exh. 1, at 1. Matthews and Perkinson met only once before the application was filed. Tr. 178. They spoke on the telephone but almost all conversations were initiated by Mr. Perkinson; the discussion involved finances and settlement. Tr. 197, 250-51. Mr. Perkinson is the only SCC stockholder Ms. Matthews has met. MMB Exh. 1, at 17. She was told nothing about them and she has never seen any information about their ability to provide the financial support Mr. Perkinson said they would. *Id.*, at 18.

15. Skywave has initiated ten other FM applications with the same legal organization and in almost every case with a local resident, the same arrangement as that proposed here . Tr. 265-66.

Issue 2 and 3: Whether Skywave is financially qualified and whether Skywave's financial certification was honest.

16. Skywave estimates that it needs $126,800 to construct and $83,325 to operate the proposed facility. Skywave Exh. 2. Before the application was filed Skywave obtained a letter from Bank One of Indianapolis, Indiana stating a "willingness" to lend $400,000 to Skywave. Skywave Exh. 2, at Attachment C. The additional money was to be used to refinance debt which resulted from prosecution of its application. Skywave Exh. 2, at 4. In March 1990, the amount was increased to $450,000 because of the $75,000 owed to Tri-State pursuant to a settlement agreement. *Id.* The first letter was written on April 27, 1987 and the second on March 30, 1990. The 1990 letter noted that the bank had received personal financial information from Ms. Matthews and updated financial information about major shareholders in SCC. Skywave Exh. 2, at D.[3]

17. Perkinson discussed the loan with Anthony P. Schlichte, the Bank One senior loan officer who wrote the letters, and then Perkinson told Matthews to contact him. Skywave Exh. 2, at 2 and Exh. 3, at 7; Tr. 215, 260. Schlichte had been with Bank One's predecessor, the bank that financed Perkinson's mobile telephone business, Midwest Mobilephone Corporation. Skywave Exh. 2, at 2, and Exh 3, at 7, Exh. 4, at 2; Tr. 260. SCC was an outgrowth of the mobile telephone business. Schlichte based his decision to issue the letter on his previous relationship with Perkinson and his understanding that Skywave's owners were identical to Midwest Mobilephone's. Skywave Exh. 7 at 2. Schlichte said that he had reviewed financial information for Midwest's major stockholders when Midwest borrowed for the cellular telephone business, apparently in the early 1980's. Skywave Exh. 4, at 2. He believed then that their creditworthiness in the aggregate was adequate. *Id.* Mr. Schlichte is no longer in the department of Bank One that makes loans to communications entities. Skywave Exh. 4, at 1. Schlichte did not know Matthews and he said it was unlikely that he would issue a letter to her without SCC. Tr. 285, 288, 289, 292, 293. Bank One, Schlichte represented, had received financial information about SCC's principals in connection with Midwest Mobilephone's loans during the period they were outstanding. Skywave Exh. 4, at 3. (The record does not reflect when these loans were outstanding.)

18. Mr. Perkinson stated that he could not remember providing any financial information about SCC stockholders for this proposal. Tr. 261. He was not sure about whether he had provided any for SCC's other broadcast proposals. *Id.* Mr Schlichte did not recall receiving any financial information from Matthews before he issued the April 1987 letter. Tr. 289. Although he agreed that before the bank would make a loan to Skywave, it would be necessary for Ms. Matthews to personally guarantee the loan. *Id.* Schlichte said the bank is not bound to make the loan but that it is likely to do so. Tr. 292. Personal guarantees and collateral will be required. Tr. 286, 289, 290.

Issue 4: Whether Matthews and Perkinson were truthful in their deposition testimony

19. Ms. Matthews was deposed on January 31, 1989 and Perkinson was deposed on February 16, 1989. MMB Exhs. 1 and 3. Ms. Matthews represented at her deposition that Perkinson "retained" the applicant's law firm and engineer. MMB Exh. 1, at 50, 51, 56-57. Perkinson said Matthews hired them. MMB Exh. 3, at 65-67, 113, 115. Matthews when examined during the hearing about her statements said that because she had not signed a contract for their services, she concluded she had not hired them. Tr. 181-85, 188. She assumed they would do the work. She had also stated at her deposition that Phillip Kappes had been introduced to her as Skywave's counsel, but when questioned she said she "felt" like he became her lawyer when they were introduced. Tr. 180. In her written testimony Ms. Matthews said that she now knows no retainer or contract has been signed. Skywave Exh. 1, at 5. She never worked out any method of payment with the engineer or the lawyers; instead, she claims that she believed they would bill at the prevailing hourly rate. Tr. 188-89, 190.

20. Matthews said at the hearing that she now thinks that she did hire the firms. Perkinson said he knew what Matthews had said at her deposition but he testified that she had retained them because he thought only she had the authority to do so. Tr. 249; Skywave Exh. 3, at 9. The engineer, Richard Biby, stated that he believed that he was hired to represent the applicant after receiving a telephone call from Sondra Matthews. Tr. 299-300. He said he also bills Skywave, not SCC. Tr. 296. However, Mr. Biby could not remember if he needed to do anything more than check over the work he had already done for Skywave once he heard from Ms. Matthews.

21. Matthews also had stated at her deposition that Perkinson had initiated the only capital call and Perkinson again disagreed with her and said that she had. MMB Exh. 1, at 82-84; MMB Exh. 3, at 95. Ms. Matthews claims that when she opened the bank account she called Mr. Perkinson to tell him. Skywave Exh. 1, at 7. He then sent her the $3,000 that SCC had agreed to provide as initial capitalization and told her to put in her $1,000 share. *Id.* She maintains that she thought this was the capital call but she now believes that neither one of them made a formal call. *Id.*, at 8. Mr. Perkinson states that he still believes Ms. Matthews was making a capital call when she called to tell him the bank account had been opened. Skywave Exh. 3, at 10. Mr. Perkinson said he had read Ms. Matthews' deposition before he was deposed and that he realized he was giving testimony that conflicted with her answers on who hired legal and engineering assistance for Skywave and who made the capital call. Skywave Exh. 3, at 8.

CONCLUSIONS

22. It has been alleged by Tri-State that Skywave is unqualified for four reasons: First because Skywave told the Commission that 100% control of the applicant was lodged with one shareholder, Sondra Matthews, when control was actually exercised by the only other stockholder, Skywave Communications Corporation (SCC). Second, that the letter from Bank One in Indianapolis promising to lend money to Skywave was not based on an assessment of Skywave's proposal but was an accommodation to stockholders in SCC, the preferred

shareholder, who the bank believed had been previous customers of the bank. Third, that although Skywave certified it was financially qualified, it had not obtained reasonable assurance that the project could be financed. Fourth, that the testimony of Ms. Matthews and the representative of SCC, Leon Perkinson, is unreliable about who exercises control. With regard to the fourth issue, Tri-State, who raised these issues but decided not to pursue a grant and try them, alleged that Perkinson and Matthews gave different answers about what actions Ms. Matthews took to effectuate the proposal.

Issues 1 and 4: Control of Skywave and Reliability of Its Principals' Representations

23. Skywave is not an ongoing corporation, unlike the corporation SCC, which has been party to ten FM broadcast applications at the Commission. It was created by SCC to file for this FM channel at Evansville, Indiana. From the outset, Skywave has represented that all of its control rests with a single stockholder, Sondra Matthews, who holds only 25% of the equity. SCC initiated the proposal when it hired an engineer to assess the Evansville allocation and located Ms. Matthews to ostensibly organize the proposal, apply for the frequency, construct the station, and operate the facility. SCC also provided the initial money needed to pursue the proposal. Ms. Matthews was required to contribute only $1,000 in capital. She has never operated a broadcast station before but she is a local resident, African-American, and female. She also claimed in her integration statement that she has been involved in local activities. In fact, SCC represents that its plan for establishing broadcast applicants with local women and minority participants is in response to Commission quantitative integration preferences. Skywave Exh. 31, at 1-2. In order to benefit from these policies, SCC realized that its significant 75% equity position would have to be viewed by the Commission as being without control. Skywave's basic representation to the Commission has, therefore, been that SCC is not involved in the effectuation of the proposal and will not be involved in the business of the licensee. Skywave has not met its burden in establishing that assertion and, moreover, its showing exhibits an intent to mislead the Commission about who controls the applicant. Neither Mr. Perkinson nor Ms. Matthews provided trustworthy testimony on this issue.

24. Ms. Matthews represents that she first heard about the frequency in the spring of 1986 and that "shortly thereafter" Leon Perkinson of SCC contacted her about joining with SCC in applying for the Evansville facility. Ms. Matthews claimed that Skywave did not form a corporation right away because the "filing window for Evansville had not yet been established." Skywave Exh. 1, at 2. Actually Skywave Corporation was not organized until April 24, 1987, nearly a year later, and only six days before the application was filed on April 30, 1987. Nevertheless, during the intervening year all the arrangements were made for Skywave's Evansville proposal. As is the case in most broadcast applications, Skywave relied on professional assistance from lawyers and engineers. Both Ms. Matthews and Mr. Perkinson relied on these professionals to organize the corporation and complete the application. Mr. Perkinson made the original judgement, based on a report by consulting engineer Richard Biby, to pursue an application for Channel 298A in Evansville. While neither Mr. Perkinson nor Mr. Biby could remember what year this step was taken, Mr. Perkinson appears to claim it was initiated before he contacted Ms. Matthews and proposed that they join in this application. There is no evidence that Mr. Perkinson advised Ms. Matthews that the channel might not be viable nor is there evidence that he shared Mr. Biby's report with her, although he viewed Mr. Biby's work as a debt of Skywave's and the report was not complete when he first contacted her. To insure that Skywave would be recognized as the entity undertaking the proposal, Perkinson prepared a letter for Ms. Matthews' signature in which Skywave promised to reimburse SCC for the engineering that Mr. Biby did in this respect.

25. Skywave, in putting forth evidence to establish that it is a *bona fide* two-tier stock corporation, urged that Ms. Matthews obtained the antenna site. The facts do not support that claim. The engineer Mr. Perkinson selected suggested the antenna site location and Ms. Matthews was directed to obtain assurance for the site with a form letter provided by Mr. Perkinson. But the assurance she obtained was judged by Mr. Perkinson to be inadequate because she had not obtained the signatures of the actual owners of the land and without consulting her, he corrected the problem with the landowner. Ms. Matthews testified that she was not even consulted about what Mr. Perkinson was doing. She said she does not know to this day how the proper assurance was obtained.

26. Skywave also represented to the Commission that Ms. Matthews hired legal counsel and engineering consultants. Mr. Perkinson twice testified that she retained them. There is no reliable evidence to support that claim. Mr. Perkinson concedes that he suggested the lawyer and the engineer that assisted Skywave in 1986. In fact, the engineering firm had been hired to find a suitable site before Mr. Perkinson selected Ms. Matthews. Although Richard Biby, who is the applicant's engineer, said that he spoke with Ms. Matthews, he knew that the work would be paid for because of Mr. Perkinson's involvement. They had a longtime relationship. He also said that the information about the channel "viability" was the basis for the engineering that resulted in the application. When Ms. Matthews was asked about her arrangements with Mr. Biby, she was unable to even explain what he based his charges on. She never worked out or inquired about time schedules for performance of the work. Mr. Biby states that he filled in the engineering section of Form 301.

27. Ms. Matthews represented, contrary to Mr. Perkinson's claim that she hired communications counsel, that he called the firm, McFadden, Evans and Sill, and someone from the firm called her. While Mr. Perkinson maintains that the call demonstrates that Ms. Matthews was in control, her account of what she did does not support that claim. She did not discuss charges or when the work would be completed and she still is unable to explain how the firm is compensated. The McFadden of the firm name is a stockholder of SCC and the firm usually, if not always, represents applicants in which SCC participates. There is no evidence that Ms. Matthews acted independently on these matters or that she did anything more than accede to SCC's usual choices.

28. Perkinson maintains steadfastly that Ms. Matthews took the initiative in hiring people to prepare the application but Ms. Matthews has been unable to substantiate that she made those decisions in an independent businesslike manner.

29. Ms. Matthews did open a bank account at a local bank where she deposits money SCC provides to pay the applicant's bills. There is no doubt that she performs these bookkeeping functions. However, Skywave and Ms. Matthews have attempted to demonstrate that Ms. Matthews made the decision to reimburse SCC for engineering and site fees paid by SCC before Skywave had a bank account. At one point in the hearing, Ms. Matthews was asked about a letter she wrote to SCC promising SCC that Skywave would reimburse it for the money spent. She maintained that she typed the letter to SCC, which is undated. When she was asked why a typist's initials were at the bottom of the letter and why they were not her initials since she typed the letter, she said she made them up to make people think she had a secretary. Ms. Matthews realized, after a while, that that answer was incredible and she conceded that Mr. Perkinson sent her the letter for her signature. The discourse on the letter illustrates Skywave's unwillingness to truthfully inform the Commission and is one more example of Skywave's willingness to misrepresent Ms. Matthews' authority and independence from SCC.

30. Ms. Matthews' account of her role in obtaining the letter from Bank One is disingenuous. She represents that she provided the Bank One loan officer, Anthony P. Schlichte, with information about the proposal and financial information about herself before Bank One issued a loan letter in 1987. Mr. Schlichte does not corroborate that account. Mr. Schlichte said he did not recall receiving any information from Ms. Matthews when the first letter from Bank One was written in April 1987.

31. The Bureau and Skywave conclude that while SCC and Perkinson participated in the formation of the applicant and filing of the application, once the application was filed Ms. Matthews directed the affairs of the applicant. Ms. Matthews, in her testimony, cites her single role in settlement negotiations "without any input or consultation from Mr. Perkinson." Skywave Exh. 1. at 8. But Mr. Perkinson testified that he was consulted about settlements. He also participated in discovery. The fact of the matter is that once the application was filed there were no major decisions to make except about settlements and discovery; the record does not support Ms. Matthews claim that she acted alone. Ms. Matthews at most carried out functional tasks which Mr. Perkinson initiated and arranged. Ms. Matthews has not shown any real prospect of acting alone. *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 (1990).

32. Moreover, SCC and Perkinson have been in a position to dominate the applicant's affairs from the outset and if Skywave had not given up its right to operate the station to Fed City there is little question that SCC would have eventually exercised control directly. SCC has the right to require Ms. Matthews to purchase its interest in May 1993 or it can convert its 75% equity, now held in preferred nonvoting shares, to common voting shares. It is unlikely, despite Ms. Matthews claim that she would purchase the shares, that that would have happened. Ms. Matthews did not even have the $1,000 for her capital contribution.[4] She was able to contribute only part of the money, the rest came from her mother and her two sisters. MMB Exh. 1, at 84. In addition, she conceded that her attempts at financing the construction and operation of the proposed facility were not successful. Mr. Schlichte stated that Bank One would not have promised to lend the money to Skywave if she alone had asked. There is no evidence that would lead to the conclusion that SCC conversion rights will not lead to overt control. Of course, now it is an equally foregone conclusion that Fed City will control. Skywave did not even provide for the possibility that it could buy out Fed City until the Bureau urged that without such a provision the settlement agreement would violate Commission policy.

33. Perkinson's claim that SCC is a passive investor who set out to merely meet the Commission's comparative standards by selecting Ms. Matthews to actively manage the broadcast facility, is an inaccurate characterization of its real intent. SCC has participated in ten applications and its claim of passive intent on similar facts has been found without support. *See Channel 32 Broadcasting Company*, 5 FCC Rcd 7373, 7376 (1990). In addition, as already detailed, when examined about their intentions Perkinson and Matthews gave unreliable testimony. Skywave is not qualified to receive a grant under Issue 1 and Issue 4. *See RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222, 3224 (1990); *Perry Television, Inc.*, 5 FCC Rcd 1667 (Rev. Bd. 1990).

Issue 2 and 3: Reliability of Skywave's Financial Certification and Financial Qualifications

34. Before an applicant certifies that it is financially qualified it must evaluate its ability to construct the station and operate for three months without using revenues and be able to conclude that there is reasonable assurance of sufficient money to finance the proposal. Skywave obtained a letter from Bank One, Indianapolis, Indiana in April 1987 which purportedly represented the bank's assurance of its willingness to lend Skywave $400,000. Anthony P. Schlichte was the loan officer who provided the letter. Mr. Schlichte admits that he did not examine the details of Skywave's proposal for Evansville and there is no reliable evidence that Skywave provided Bank One with those details. Instead, Mr. Schlichte relied on his knowledge of the stockholders of SCC from a previous transaction to conclude that Bank One could sign the letter which Mr. Perkinson had provided. Mr. Schlichte stated that he knew about the financial ability of some of what he understood were SCC's stockholders. He said he "understood" that the owners of Midwest Mobilephone, a borrower from Bank One and its predecessor bank, were the same people who owned SCC. There is no evidence on what Mr. Schlichte based his understanding but it can be assumed he did not make an independent analysis that Midwest Mobilephone's borrowers were the same or he would have said so. Instead, he said he could not remember what information was provided for this proposal. Overall Mr. Schlichte's carefully written testimony is important for what he did not say rather than for what he did say on these issues. With regard to crucial information, Mr. Schlichte repeatedly had memory lapses. Some of SCC's stockholders, he represents, had provided financial information to Bank One to obtain Midwest Mobilephone's loan. He also claimed that periodically, while the loan was outstanding, the principals of Midwest Mobilephone provided updated financial statements. Mr. Perkinson admits that SCC did not provide financial statements to obtain Skywave's letter. Ms. Matthews, however, claims that she sent Mr. Schlichte financial information about herself, but Mr. Schlichte does not recall seeing that information. Mr. Schlichte maintains that he relied only on his memory of financial statements the bank had received from the principals of Midwest Mobilephone in

the past. Mr. Schlichte does say that it would be necessary for Ms. Matthews to personally guarantee the loan. The record reflects that Mr. Schlichte did not know whether her guarantee would provide any security to the bank.

35. Skywave has not established whether Mr. Schlichte had or consulted currently accurate financial information about Skywave and its principals. Mr. Schlichte does not provide information about when he last received periodic financial statements from the principals of Midwest Mobilephone. He appears to indicate that Midwest Mobilephone was a borrower in the early 1980's (Skywave Exh. 4, at 2) and that Mr. Perkinson approached him for loan letters for SCC's broadcast applications in the mid-1980's. *Id.* There is no evidence to show that Mr. Schlichte made an assessment of who SCC's owners were or their financial conditions when he issued the April 1987 letter. His testimony indicates that because SCC stockholders had been customers of the bank, he believed them to be creditworthy. Essentially, there is no evidence that Bank One had any current basis for stating it was willing to provide a loan to Skywave.

36. Mr. Schlichte explained that he knew Mr. Perkinson and Mr. Perkinson asked him to write the letter. Mr. Schlichte, after having the bank's legal counsel review the letter provided by Mr. Perkinson, signed it on behalf of the bank. Mr. Schlichte readily admits that the bank made no assessment of the proposal and no current assessment of the borrower. Under those circumstances, it is not established that the bank treated Mr. Perkinson's request as an arms length business transaction in which the bank sincerely evaluated whether it would at some future time lend Skywave $400,000.

37. While Mr. Perkinson claims he provided balance sheets for the principals of SCC when Midwest Mobilephone borrowed money, his testimony is incomplete and evasive on the issue. He does not identify when he provided the information and whether it could be relied on by Bank One at the time the April 1987 letter was written to Skywave. Ms. Matthews claims that she provided financial information and estimates about the proposal to Mr. Schlichte are not corroborated by him. Mr. Schlichte's testimony was in writing and it is evident that if he could have backed Ms. Matthews up, he would have done so. Both Mr. Schlichte and Ms. Matthews were represented by the same counsel. The record reflects that Ms. Matthews certified without knowing whether the bank had actually evaluated the applicant. Ms. Matthews stated that she has never met any of the SCC stockholders except Mr. Perkinson and she has never seen any information about their ability to underwrite the loan. Again she simply performed the acts Mr. Perkinson directed her to do. She never had any basis to evaluate whether Bank One was actually providing reasonable assurance. Nevertheless, despite her lack of knowledge about how the bank made its decision and how the letter happened to be sent, she certified that the applicant was financially qualified.

38. Ms. Matthews was selected by SCC and all during this proceeding, the record reflects, she acceded to the experience of Leon Perkinson who, along with his SCC stockholders, crafted ten applications to fit the Commission's criteria. It is an example of form over substance. The reality is that Ms. Matthews does not control; SCC makes all decisions. It is equally clear that Bank One issued the form letter given to it by Mr. Perkinson as an accommodation to a former good customer.

39. Ms. Matthews, who did not have the experience in Commission proceedings that Mr. Perkinson did, at discovery gave some candid answers to questions about her role. Mr. Perkinson read her deposition and deliberately gave answers which fit the game plan. Ms. Matthews' testimony and her reasoning at the hearing where she tried to meet Mr. Perkinson's expectations, however, was not convincing and was not supported by the record as a whole. The Commission cannot rely on Skywave's representations made thus far; it is likely that it will not be able to do so in the future. Skywave's application for Evansville will be denied for failure to meet its burden in establishing that its representations to the Commission about its ownership and finances are reliable and truthful. Skywave is not a qualified applicant.

ACCORDINGLY, IT IS ORDERED that the application of Evansville Skywave, Inc. (File No. BPH-870430OK) for a construction permit for a new FM station on Channel 298A at Evansville, Indiana IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] Whether SCC or Ms. Matthews will ever exercise those rights is now uncertain, since by May 1, 1993, the right Skywave has sold to Fed City to first purchase a 49% interest and then a 51% interest will most likely have arisen. No record was developed about who decided to sell Skywave to Fed City.

[2] Every voting stockholder is entitled to notice of the annual meeting but if a matter is on the agenda, such as a change in the by-laws, which all shareholders may vote on, then all shareholders are entitled to notice. Skywave Exh. 1, Attach. 2, at 3.

[3] The importance of the second letter appears to be a moot point with regard to the designated issues. The 49% shareholder, Fed City Communications, Inc. is now obligated to provide financing.

[4] When the time came to contribute the capital of $4,000 after a bank account had been established, Ms. Matthews stated that Mr. Perkinson made the capital call. Mr. Perkinson denies that he did but the record reflects that he called Ms. Matthews and told her to contribute her $1,000 share. Whether or not his action was a capital call is irrelevant; at the moment when money needed to be paid he told Ms. Matthews to ante up. Ms. Matthews said there were no other requests for her to provide capital. SCC established a line of credit with Peoples Trust and Bank in Indianapolis and Ms. Matthews opened an account at the Peoples Trust and Bank in Evansville. When funds were needed they were simply transferred from one bank to the other.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 2815

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: February 22, 1991; Released: February 22, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 2815 to modify Virtual Telecommunications Network Service (VTNS) Option 19 under Tariff F.C.C. No. 12, which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations.

2. The Transmittal 2815 revisions to Option 19 reduce the basic charge; reduce the minimum annual charge; adjust change charge rates; and modify the regulation permitting the customer to reduce the number of 56 kbps Data Transmission Capabilities. A textual change was also made to Section 7.21.2.B.4 to conform the tariff language in Option 19 with that of other VTNS options. *See* AT&T Transmittal 2815 D&J at 2 & n.*.

3. Williams Telecommunications Group, Inc. (Williams) filed a petition to reject or suspend and investigate the Option 19 modifications on January 11, 1991. AT&T filed a reply on February 7, 1991, accompanied by a motion for leave to file its reply after the due date established by the Commission's Rules.

4. Williams argues that Tariff 12 options are not generally available and that AT&T's cost support is inadequate. Williams Petition at 13-16, 20-22. Williams also claims that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. *Id.* at 17. Williams further contends that the Commission should adopt, or require AT&T to adopt, safeguards to remedy any unlawful discrimination that will occur if the modifications to Option 19 take effect. *Id.* at 22-24.

5. AT&T contends that good cause exists to file its reply late because its legal department did not receive a copy of William's petition from its Case Management Group in a timely manner due to administrative oversight. AT&T states that Williams' filing was brought to the legal department's attention on February 5, 1991, that the legal department received a copy of William's petition on February 6, 1991, and that it filed its reply one day later. AT&T further argues that no party will be prejudiced by the filing as no responsive pleading is allowed.

6. AT&T's reply was due to be filed no later than January 22, 1991. AT&T's reply therefore was filed 16 days late. AT&T's administrative oversight does not constitute good cause for leave to file late. Accordingly, AT&T's motion for leave to file its reply late will be denied and its reply will be dismissed.

7. The Common Carrier Bureau has reviewed AT&T Transmittal 2815 and the petition filed by Williams. We conclude that no compelling argument has been presented that this tariff is so patently unlawful as to warrant rejection.

8. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although this transmittal does not present new questions that warrant investigation at this time, it could be affected by the pending remand proceedings in CC Docket No. 87-568. Accordingly, Transmittal 2815 takes effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

9. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal 2815 filed by Williams Telecommunications Group, Inc., IS DENIED.

10. IT IS FURTHER ORDERED that AT&T's motion for leave to file its reply late IS DENIED and its reply IS DISMISSED.

11. IT IS FURTHER ORDERED that Transmittal 2815 takes effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 22, 1991

Petition for Declaratory Ruling that States and the District of Columbia Are Preempted from Imposing Public Utility Regulation On Enhanced Services Providers

Sixteen enhanced service providers (ESPs) or trade associations representing the ESP industry ("Petitioners") have filed a petition requesting that the Commission declare that states and the District of Columbia are preempted from imposing public utility regulation on carrier-affiliated and noncarrier-affiliated enhanced service providers.[1]

Petitioners call the Commission's attention to recent decisions by the District of Columbia Public Service Commission (DCPSC), the Florida Public Service Commission (FPSC), and the Delaware Public Service Commission tentatively concluding, or taking steps, to impose public utility regulation on enhanced services provided by carriers and/or ESPs not affiliated with, or subsidiaries of, carriers. Petitioners argue that the state regulation envisioned in these proceedings is contrary to the public interest, and would thwart or impede the federal policy that enhanced services be provided on an unregulated, competitive basis.

According to petitioners, California v. FCC, 905 F.2d 1217 (D.C. Cir. 1990) did not address preemption of state regulation of noncarrier-provided enhanced services, in Computer II the Commission preempted state regulation of noncarrier-provided enhanced services, and that preemption remains in effect. Petitioners additionally argue that under California v. FCC and Section 2(b)(1) of the Communications Act, 47 U.S.C. Section 2(b)(1), the Commission can, and should, preempt state regulation of carrier-provided enhanced services that would thwart or impede the federal policy that interstate enhanced services be provided on an unregulated, competitive basis. According to petitioners, that policy would be thwarted or impeded where intrastate enhanced services cannot be separated from interstate enhanced services, where state regulation artificially lowers or raises the prices of services provided by carriers versus services provided by noncarriers, and where such regulation creates uncertainty and disuniformity in the enhanced services market.

Petitioners argue that the need for the requested ruling is urgent because the threat of state regulation is having a chilling effect on service offerings of ESPs. Some ESPs are considering the artificial restructuring of their services to avoid such regulation, petitioners contend. Petitioners aver that a declaratory ruling is the appropriate manner to remove uncertainty as to the extent of permissible state regulation of enhanced services.

The petition additionally calls attention to the definition of "intrastate" service adopted by the FPSC in the decision cited by petitioners. That decision, petitioners state, asserts state jurisdiction over services from an ESP's point of presence in Florida to the point of origination or termination in Florida without regard to whether the service is being used to originate or terminate an interstate enhanced service. Petitioners also aver that the staff of the DCPSC has taken an expansive view of state jurisdiction arguing for state authority over electronic mail service provided on an interstate basis.

Comments are solicited on the request for declaratory ruling, including on the jurisdictional issues raised by the state decisions cited in the petition.

Interested parties may file comments on or before April 8, 1991 and reply comments on or before May 8, 1991 with the Secretary, Federal Communications Commission, 1919 M. Street, N.W., Washington, D.C. 20554. A copy should be sent to Peggy Reitzel, Common Carrier Bureau, Federal Communications Commission, 1919 M. Street, N.W., Washington, D.C. 20554 and to the Downtown Copy Center, the Commission's contractor for public records duplication, 1114 21st Street, N.W., Suite 140, Washington, D.C. 20037. The petition, and copies of the DCPSC and state decisions referred to in the petition are, and comments and reply comments will be when filed, available for inspection and photoduplication in Room 544, 1919 M. Street, N.W., Washington, D.C. 20554. Copies may additionally be obtained from the Downtown Copy Center.

For further information contact Patrick Donovan, Common Carrier Bureau, (202) 632-4047.

FOOTNOTE

[1] The petitioners are the Computer Software and Services Industry Association, Inc., ADT Security Systems, Inc., Automatic Data Processing, Inc., BT Tymnet, Inc., California Bankers Clearinghouse Association, Compuserve Incorporated, Digital Equipment Corporation, The Dun and Bradstreet Corporation, GE Information Services, the Information Industry Association, International Business Machines Corporation, Mastercard International Incorporated, McGraw-Hill, Inc., National Data Corporation, Prodigy Services Company, and Visa U.S.A., Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-40

In re Applications of

ROYSE RADIO, INC. File No. BPH-891011MB
(hereafter "Royse")

JAMES B. MYERS, III File No. BPH-891012MI
(hereafter "Myers")

For Construction Permit for a
New FM Station on Channel 264A (100.7 MHz)
in Horse Cave, Kentucky

HEARING DESIGNATION ORDER

Adopted: February 19, 1991; Released: March 4, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Myers*. Section II, Item 6 of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Myers has not completed Item 6 correctly. Myers's application gives a post office box number as his residence address. Accordingly, Myers must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this Order is released.

3. Hancock Communications, Inc., ("Hancock") licensee of WKCM-FM, Cannelton, IN, has submitted a Petition for Rule Making to the Commission, proposing to upgrade its current facility from Channel 275A to Channel 275C3. In order to facilitate this upgrade, Hancock proposes that WVPC, Beaver Dam, KY move from Channel 274A to 264A, and that the Horse Cave allocation be moved from Channel 264A to 294A. To date, no action has been taken on the Hancock petition (RM-6558). Thus, the Horse Cave applications will proceed to hearing on their current channel. However, the construction permit ultimately issued in the Horse Cave proceeding will be conditioned on whatever action is taken pursuant to the Hancock petition.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That Myers shall submit an amendment which contains the information required by Section II, of FCC Form 301 (June 1989), to the presiding Administrative Law Judge within 30 days after the release of this Order.

7. IT IS FURTHER ORDERED, That the construction permit ultimately issued in the Horse Cave proceeding will be conditioned on whatever action is taken pursuant to the Hancock Communications, Inc. Petition for Rule Making (RM-6558).

8. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-37

In re Applications of

MORGAN COUNTY INDUSTRIES, INCORPORATED (hereafter "Morgan") File No. BPH-891222MG

WOODFORD F. MAY (hereafter "May") File No. BPH-891227ME

For Construction Permit for a New FM Station on Channel 275A in West Liberty, Kentucky

HEARING DESIGNATION ORDER

Adopted: February 19, 1991; Released: March 4, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Morgan and May would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Morgan and May would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

6. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-39

In re Applications of

JULIE J. CAREY (hereafter "Carey") — File No. BPH-891011ML

FRANK A. ROGERS (hereafter "Rogers") — File No. BPH-891012MI

JACQUELINE D. WATSON (hereafter "Watson") — File No. BPH-891012MZ (Previously Returned)

For Construction Permit for a
New FM Station on Channel 236A (95.1 MHz)
in Nashville, Indiana

HEARING DESIGNATION ORDER

Adopted: February 19, 1991; Released: March 4, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. On May 9, 1990, the application filed by Watson was returned as unacceptable for tender due to inconsistencies between the elevation and radiation center height data in Items 7(a) and (b) and the data provided in the antenna sketch. On June 7, 1990, Watson filed a cover letter accompanied by an amendment which purportedly corrects the inconsistencies in her proposal.

3. By means of the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the Commission promulgated new processing procedures for commercial FM applications. These procedures, *inter alia*, restrict the period of time within which amendments of applications may be filed. *See*, Paragraph 31 and Appendix D of the *Report and Order*, above, as well as Section 73.3522(a)(6) and 73.3564(a) of the Commission's Rules. Since the adoption of the new processing rules, the Commission has clearly stated that applicants may not correct tenderability defects after the close of the filing window and may not correct acceptability defects after the time for filing amendments as of right. *See, e.g. Primemedia Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988). As the Nashville filing window closed on October 12, 1989 and the last date for filing amendments as of right was January 29, 1990, the June 7, 1990 attempt to amend the deficient application was clearly untimely.

4. Moreover, to properly lie, a request for reconsideration of a finding of untenderability and a request for *nunc pro tunc* reinstatement of the application in question must demonstrate that such finding concerning the application as originally filed was erroneous. *See*, the *Report and Order*, above, and Section 1.106(d)(2) of the Rules.

5. The instant cover letter, even if considered as a petition for reconsideration, does not demonstrate that the finding of untenderability of the subject application as originally filed is erroneous. Rather, it appears to admit that the application as originally filed was untenderable and merely submits corrected data. Therefore, reconsideration is not warranted. Accordingly, the amendment will be returned, and the "petition" for reconsideration denied.

6. *Rogers*. Section II, Item 6 of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Rogers has not completed Item 6 correctly. Rogers' application gives a post office box number as his residence address. Accordingly, Rogers must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this Order is released.

7. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Carey would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Carey would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That Watson's June 7, 1990 amendment IS HEREBY RETURNED, and the accompanying "petition" for reconsideration IS DENIED.

12. IT IS FURTHER ORDERED, That Rogers shall submit an amendment which contains the information required by Section II, Item 6 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

13. IT IS FURTHER ORDERED. That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 91-2

In the Matter of

Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video Data Services — RM-6196

NOTICE OF PROPOSED RULE MAKING

Adopted: January 10, 1991; Released: March 4, 1991

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to amend Parts 0, 1, 2 and 95 of its Rules to establish an interactive video data service (IVDS) in the 218-218.5 MHz band. This action responds to a Petition for Rule Making (RM-6196) filed on December 2, 1987, by TV Answer, Inc. (TV Answer). The proposed IVDS system would allow viewers to respond to queries associated with television programming, order products and services and offer educational and other information. The Commission believes that IVDS systems will provide the public with a convenient method for interacting with all forms of video programming, including commercial and educational broadcast television, cable television and direct broadcast satellite service.

BACKGROUND

2. In its petition, TV Answer proposes a system that would provide interactive video and data services to TV viewers. TV Answer states that its system would permit real-time viewer response and polling for such uses as educational programming, pay-per-view programming, and ordering products and services. In addition, it submits that its system is capable of downloading data such as television program listings, video catalogs, and educational materials to subscribers. As described by the petitioner, the TV Answer system consists of in-home units, local base stations and a central control facility. The in-home unit, called an AnswerBox permits viewers to respond to queries from the system and to access received and stored information. The local base stations distribute information to in-home units, process local service requests and relay information to and from the central control facility via an independent relay link. The central control facility oversees system management, distributes information and queries, and processes viewer responses and requests. According to TV Answer, its system is capable of processing nearly 700,000 communications each minute.

3. TV Answer indicates that its system could support a wide range of interactive viewer services. For example, a commercial on a regular TV program could be accompanied by a prompt that would allow the viewer to order the product being advertised. TV Answer states that another feature could allow the viewer to access program listings that are downloaded from the central control facility. It submits that many other services of a similar nature would also be possible.

4. In its pleadings, TV Answer states that 500 kHz of spectrum is necessary for operation of its system, and that an allocation in the 216-220 MHz band is necessary for it to offer the service at a cost that would be attractive to consumers. In its experimental system and subsequent technical analyses, TV Answer bases the feasibility and electromagnetic compatibility of its service on an allocation within the 216-220 MHz band.

5. A large number parties filed comments in response to the TV Answer petition.[1] Many parties are supportive of an interactive viewer response service. These parties, which include broadcasters, cable operators, and educational institutions, cite the instructional benefits and commercial services to be provided by interactive television. The National Cable Television Association, Inc. (NCTA) states that the cable industry has long sought the development of an interactive technology. The Community Antenna Television Association, Inc. (CATA) submits that services such as "pay-per-view" offerings currently can be made only by costly two-way cable, or telephone. It claims that these methods cannot achieve the potential success of a service such as that proposed by TV Answer.

6. Other commenters, also representing broadcast interests, express concern regarding the potential for TV Answer's system to cause interference to reception of TV channel 13 service. In particular, the National Association of Broadcasters (NAB), although taking no position with respect to the desirability of TV Answer's proposal, submits that the signals from in-home units at 218.25 MHz will mix with the TV channel 13 signal and result in an interfering third signal, or intermodulation product, near the TV channel 13 visual carrier. Further, the Association of Maximum Service Television (MSTV)[2] in supplemental comments, contends that if many responses per minute were to arrive sequentially at a victim TV receiver, it could cause interference of a significant duration. [3] MSTV states that this scenario raises doubts regarding TV Answer's arguments that the cumulative effect of its transmitter responses would be negligible. The National Broadcasting Company (NBC) argues that the TV Answer petition leaves so many questions unanswered that a notice of proposed rule making is not warranted. Several other commenters expressed similar concerns with respect to TV Answer's original proposal. Opposition comments were also filed by Waterway Communications System, Inc. (Watercom), a maritime mobile service licensee operating in the 216-220 MHz band. Watercom contends that congestion and continued growth in the VHF maritime bands necessitate that currently unused portions of the band continue to be reserved for the expansion of the maritime mobile service.[4]

7. In order to address the interference concerns of commenters, and as a result of its ongoing experiments, TV Answer has refined its system and filed supplements to its original system proposal.[5] TV Answer now proposes to structure its system to operate with multiple local base units in a cellular arrangement. The 500 kHz of spectrum

would be divided into ten 50 kHz channels that would be reused in the local area in accordance with a cellular local base station plan. Additional modifications include reducing the maximum output power of in-home units to 20 watts (the output power of these units can be further reduced under control of their associated local base station), removing the control pulse code that was to be embedded in the NTSC television signal, and revising its system architecture to employ cellular-like base stations that would communicate with in-home units using the same frequencies in the 218-218.5 MHz band.[6] Based on theoretical and field studies, TV Answer also proposes the following limits for local base station maximum effective radiated power (ERP):[7]

TV Channel 13 Service Area	Maximum Base Station ERP
Grade B Service Area	1.05 watts
Grade A Service Area	6.60 watts
City Grade Service Area	20.00 watts
Outside Grade B	20.00 watts

TV Answer states that these revisions should eliminate the potential for its system to interference with TV channel 13 and should provide an adequate service area (approximately 2 miles) for its base stations. With respect to in-home units, TV Answer states that the low duty cycle and infrequency of transmissions from individual units will minimize interference to television reception. Further, TV Answer submits that should any TV channel 13 viewer receive interference as a result of TV Answer operations in the area, it will install a 218.25 MHz notch filter at the input of the affected television receiver.

8. MSTV, in responding to TV Answer's supplemental filings, agrees that TV Answer's revised system design and affirmative interference prevention measures would minimize or eliminate potential interference to TV channel 13 broadcasting and reception. MSTV states that, subject to certain conditions, it believes that the proposals set forth in TV Answer's latest revision,[8] if properly codified, would protect TV channel 13 operations sufficiently to allow the Commission to proceed with the spectrum allocation that TV Answer seeks.[9]

DISCUSSION

9. *Need for Allocation.* Based on our analysis of TV Answer's revised proposal and our review of the comments filed in response to its petition and supplememental filings, we believe that an allocation of spectrum for interactive video data service would serve the public interest. One of the outgrowths of advancing technology is the advent of interactive computer services, such as PRODIGY and COMPUSERVE, that allow users to access information and services via personal computers.[10] We believe that IVDS offers the potential for extending similar capabilities to television viewers. As discussed above, this service will provide a convenient means of interaction with television for commercial applications, such as ordering products offered on home shopping programs or ordering pay-per-view programming, as well as offering opportunities for educational applications, such as student response to live video instruction.

10. *Proposed Allocation.* Our examination of the TV Answer system indicates that an allocation of 500 kHz should be adequate to operate a viable interactive video data service. We also tentatively conclude that the 218 to 219 MHz band can be used, with proper engineering and technical design, without causing distruption or interference to adjacent Channel 13 television operations. Accordingly, we are proposing to allocate 500 kHz in the 218 to 218.5 MHz band as requested by TV Answer in its supplemental filings.

11. We request comment on the amount of spectrum that might be needed for interactive video data services. Specifically, we request comment on whether the 500 kHz we are proposing for this service is adequate to meet the needs of IVDS system operators and viewers. We also request comment on the possibility of operating IVDS systems with less than 500 kHz. We further ask that interested parties address whether additional spectrum may be needed to accommodate multiple service providers and future growth in demand for IVDS.

12. The 218.0-218.5 MHz band we are proposing for IVDS currently is allocated to the Group D ship stations in the Automated Maritime Telecommunications System (AMTS) service.[11] The Group C and D AMTS channels are currently idle because of restrictions placed on their use to protect TV reception.[12] The Commission, however, has an ongoing proceeding, GEN Docket No. 88-372, in which it has proposed to ease certain restrictions on the use of the Group C and D channels, and permit expansion of the AMTS service to nationwide operation.[13] We now believe the public interest would be better served by allocating the 218.0-218.5 MHz band for IVDS than for AMTS.[14] This action would enable the operation of a new, technically innovative service without, we believe, seriously limiting the possible expansion of AMTS operations as contemplated in GEN Docket No. 88-372. We note that even with a relaxation of the restrictions on the use of Group C and D channels, the technical limitations necessary to protect TV channel 13 operations would preclude practical use of these channels by AMTS in many areas.

13. Alternatively, we request comment on whether it might be more desirable to allocate the 500 kHz for IVDS from the 218.5-219.0 MHz (the AMTS Group C ship station channels). We invite interested parties to address whether this alternative might further minimize the potential for interference to TV channel 13. We also request comment on the possibility of expanding our proposal to allocate the entire 218.0-219.0 MHz band (the Group C and D AMTS ship station channels) for IVDS use.

14. *Technical Requirements.* In developing technical requirements for IVDS operation, our principal goals are to ensure that harmful interference is not caused to TV channel 13 service, which operates on the nearby 210.0-216 MHz band, and to adjacent AMTS operations; and, to provide as much flexibility for the use of alternative IVDS technologies as possible, given our concerns for interference to TV channel 13. We believe the approach for avoiding interference to TV channel 13 employed in the revised TV Answer system generally provides an acceptable model for the development of technical requirements. However, we believe that additional provisions are needed in the transition area near the Grade B contour. Accordingly, we are proposing to limit the maximum ERP of IVDS local base stations as follows:

TV Channel 13 Service Area [15]	Maximum Base Station ERP
Principal Community	20 watts
Grade A	7 watts
Grade B	1 watt
Grade B + 2 miles	1 watt
Grade B + 3 miles	3 watts

TV Channel 13 Service Area	Maximum Base Station ERP
Grade B + 4 miles	10 watts
Grade B + 5 miles and beyond	20 watts

As suggested by TV Answer, we also are proposing to limit the maximum antenna height above average terrain (HAAT) of local base stations to 120 feet (36.6 meters).[16] As an exception to this general limit, we would permit antenna heights above average terrain up to 500 feet (152.5 meters) in cases where the antenna is located beyond 10 miles from the Grade B contour of a TV channel 13 station. We invite comment on all aspects of this proposal and will consider alternative proposals for local base station power and antenna requirements. We also invite comment on whether additional requirements should be imposed to protect TV channel 13 operations. For example, one such approach might be to require a minimum separation distance between local base stations and the nearest residence. Based on our analysis, a separation distance of 200 feet (61 meters) might be an appropriate requirement for such a provision.

15. With respect to in-home units, we are proposing a maximum effective radiated power of 20 watts. In addition, the in-home unit would be required to incorporate output power control in their design so as to be capable of using the minimum power necessary to communicate with its local base station. The system itself shall be designed to control the power level of the in-home units from the local base stations. Further, we are proposing to require that the antenna for the in-home unit be an integral part of the unit itself. We believe that these requirements, in conjunction with other provisions we are proposing, should be satisfactory for preventing harmful interference to TV channel 13 service. We also note that the operational characteristics of the in-home unit are such that tranmissions would occur relatively infrequently, and would be of limited duration.

16. An integral part of TV Answer's plan for eliminating any interference to TV channel 13 broadcasting in the 210-216 MHz band is its promise to provide 218.25 MHz notch filters to all households in television channel 13 viewing areas that experience interference due to its system.[17] We believe that this approach, along with the power and separation distances we are proposing, is an acceptable plan for resolving any instances of interference that might arise. Accordingly, we propose that IVDS licensees inform all television households located within the Grade B TV channel 13 coverage area of the potential for interference from a TV Answer-type system. In addition, we propose to require that licensees of such systems provide and install, free of charge, notch filters to any viewer who requests them and are located within the Grade B contour of a TV channel 13 station. We also propose to require that IVDS licensees investigate and eliminate such interference within 30 days of the time it is notified in writing by a viewer or the Commission of an interference complaint. If the interference is not eliminated within the 30-day period, we would require that operation of the offending transmitters of the IVDS system be discontinued. We do not intend to require IVDS systems to provide filters to protect the reception of TV channel 13 service outside a stations normal coverage area, *i.e.*, outside its Grade B contour.

17. The TV Answer system divides the 500 kHz of spectrum into ten 50 kHz channels and uses these channels within the system in a cellular-like manner. We see no need to require this channelization to protect TV channel 13 operations. Therefore, we are not proposing to specify a channelization plan for use of the bandwidth licensed individual IVDS systems. Consistent with our intention to allow the use of alternative IVDS technologies, we believe that it would be more appropriate to allow IVDS licensees to make their own decisions on how to structure their system. We request comment on this proposal.

18. With regard to emissions, TV Answer states that its system's transmissions will be a series of digital pulses modulated in both duration and phase. Therefore, we propose to limit emissions to class V1D.[18] We believe that this emission classification will provide flexibility for IVDS system designers. We request comment on whether other emission types should also be permitted. Out of band IVDS emissions could have a direct impact on both TV channel 13 and adjacent channel AMTS operations. To minimize the impact, we are proposing to limit IVDS out of band emissions as set forth in Section 80.211 of our rules.[19] With regard to frequency tolerance, we are proposing standards based on another personal radio service. In the General Mobile Radio Service (GMRS), mobile stations, small base stations and control stations are required to maintain a frequency tolerance of 0.0005 percent.[20] Although the system proposed in TV Answer's reply did not specify a frequency tolerance, we believe this standard is reasonable. Commenters should address this standard and propose alternatives if warranted.

19. *Regulatory Structure and Services.* An IVDS system would offer service to individual members of the general public. Because of the personal nature of these communications and the fact that they are offered to the public on a subscription basis, we believe it is appropriate to regulate this service as a new Private Radio Service. Assignment of facilities in this new service would be made on an exclusive basis.[21] In order to provide as much flexibility as possible in the type of services that may be offered and to minimize licensing burdens, we are proposing to establish a new Personal Radio Service, the "Interactive Video Data Service," under Part 95 of our rules. We propose to allow a wide range of types of interactive video and data services to be offered under this new Part 95 service. For example, this new service could be used to allow television viewers to respond to educational programming and polls, and to permit viewers to order a multitude of services and products, including pay-per-view programming, as suggested by TV Answer.

20. *Need for Competition.* Authorizing individual licensees to use the full 500 kHz, consistent with TV Answer's request, would effectively limit the service to only one provider per market or service area. The Commission, however, has consistently maintained that the public interest is better served by competition in the provision of radio services. A competitive industry structure promotes lower prices for services and provides in-

centives for licensees to offer quality services and to improve and enhance those services. We believe the best way to provide for competition in the IVDS is to make at least two facilities available in each market. We believe that it is reasonable to expect that two IVDS systems could exist in the same geographic area without limiting the ability of either to provide adequate service. Accordingly, we propose to split the 500 kHz allocation into two segments, Segment A and Segment B.[22] Consistent with this approach we would not license both segments in a given area to the same entity. We recognize that such an approach would require TV Answer to change its system design and might have an impact on the time it takes to transmit data between in-home units and local base stations. We request comment on this approach, particularly with respect to the impact this change would have on the viability of IVDS system operations and services.

21. *Service Area.* We propose to license IVDS operations on a local rather than nationwide basis. We believe the public interest would be better served by regulating this service on a local area basis where licensees would be more responsive to local needs. The local licensing policy we are proposing would not, however, preclude one entrepreneur from applying for and being granted an IVDS system license in many major metropolitan areas. We see no reason to restrict ownership in this service across different markets. Nevertheless, we solicit comments on whether there would be advantages to licensing this service on a nationwide basis.

22. We are proposing to define the service area in terms of a radius from a reference set of coordinates (point-radius approach), similar to the approach used for Digital Termination Systems (DTS) in Part 94 of the rules.[23] We propose to use 64.4 kilometers (40 miles) as the service area radius. The service area defined by this radius is consistent with our desire to regulate IVDS on a local area basis and with the separation requirements in the General Mobile Radio Service.[24] In the latter regard, we are proposing a minimum separation distance of 128 km (80 miles) between the reference points of systems of different IVDS licensees operating on the same segment. We would also permit IVDS applicants proposing to serve adjacent areas to negotiate with each other to identify transmitter sites and operating parameters that would enable the Commission to make grants to both applicants. We believe this approach will best minimize licensing burdens on both the public and the Commission. We solicit comments on these issues, particularly with respect to the size of the service area and the distance between service areas.

23. Two other alternatives would be to define the service area by Metropolitan Statistical Areas (MSAs) as we do for cellular operations[25] or by Designated Filing Areas (DFAs) as we do for private land mobile 900 MHz operations.[26] We could also use state boundaries to define service areas or make nationwide assignments. We request comment on the relative merits of each of these approaches.

24. *Licensing Procedure.* In view of the potentially large numbers of IVDS transmitters that might be in use, we are proposing a blanket licensing scheme for this service. All local base stations and in-home units would be licensed to the system licensee. We believe that individual licensing of each in-home unit or local base station would be costly to the service operator, individual IVDS subscribers and the Commission; and would not serve any prevailing regulatory purpose. We believe this approach is appropriate in view of the fact that the service would be offered on a subscription basis and all stations would be under the direct control of the licensee. Similiar approaches involving system level licensing of stations are used in the private radio multiple address system (MAS) service[27] and for low power DTS operations at 18 GHZ.[28] We request comments on this approach.

25. *Selection of Licensees.* We propose to select among mutually exclusive IVDS applicants using a lottery process pursuant to 47 CFR Section 1.972. Applications would be granted on a first-come, first-served basis. We believe this approach would provide the most efficient method for licensing IVDS. We believe that the use of comparative hearings to select among mutually exclusive applicants would be administratively complex and too expensive for this service. Such a process would require evaluation of competing applications based on numerous and complicated comparative criteria. Further, as the Commission has noted in the past with regard to other private radio systems, this process would prove lengthy and expensive to both the applicant and the Commission and would not necessarily result in the award of a license to the applicant who will best serve the public interest.[29] Finally, as we hope to encourage early introduction of interactive video and data services, hearing procedures would unnecessarily delay the licensing and implementation of these systems. We also request comment on whether this type of service might be particularly suited for selection of licensees using an auction type of approach. In this connection we seek comment on our statutory authority to authorize auctions in this service.

26. *Licensing Criteria.* In order to reduce the filing of speculative applications by entities that have no real intention of implementing such systems and to avoid the potential for warehousing of IVDS spectrum, we intend to establish certain basic licensing criteria. First, we propose to require that each application include a plan showing that the proposed system would provide service to at least 50 percent of the proposed service area. Second, we propose to require successful applicants to construct at least 10 percent of the proposed local base stations within one year of licensing and at least 60 percent of those stations within five years.[30] We would require licensees to file a progress report on the status of the system at the conclusion of each benchmark period. Licensees would forfeit their license if they do not meet both of the two construction benchmarks. We request comment on this approach and invite the submission of proposals for other criteria such as demonstrations of financial ability to construct the system.

27. We are proposing a five year license term for IVDS licensees. We further propose that FCC Form 574 be used for new IVDS system authorization, license modification, and assignment.[31] A license fee of 35 dollars per application would be required. A five year license term, we believe, would provide a good compromise between the burden on the licensee to renew the license and the Commission's need for up-to-date information on licensees. If, however, we modify our proposal to adopt a nationwide license, we would consider lengthening the license term.

28. Finally, in response to petition RM-6196, some respondents brought up the issue of possible health and safety concerns related to a relatively high power transmitter operating in the home. In particular, possible expo-

sure of children to RF energy was mentioned. We invite comment on this subject, in view of the Commission's responsibility under the National Environmental Policy Act 42 USC Sections 43312-43335 for minimizing environmental effects on the public health.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

29. Pursuant to the Regulatory Flexibility Act of 1980, the

Commission finds as follows:

I. Reason for Action

This action is in response to a *Petition for Rule Making* filed by TV Answer, Inc. The petition requests that the Commission amend its rules to provide for interactive video and data services. It appears that there would be substantial public benefit by providing for such services.

II. Objective

The objective of this proposal is to provide an allocation of spectrum and service rules for an interactive video and data service.

III. Legal Basis

The proposed action is authorized under Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 USC Sections 154(i), 303(c), 303(f), 303(g), and 303(r). These sections authorize the Commission to make such rules and regulations as may be necessary to encourage more effective use of radio in the public interest.

IV. Description, Potential Impact, and Number of Small Entities Affected

This proposal would provide marketing opportunities for radio manufacturers and video programming providers, some of which may be small businesses. Beyond this we are unable to quantify any other potential effects on small entities. We, therefore, invite specific comments on this point by interested parties.

V. Reporting, Record Keeping and other Compliance Requirements

Licensees will have to file progress reports to inform the Commission on their progress in meeting construction benchmarks.

VI. Federal Rules which Overlap, Duplicate or Conflict with this Rule

None.

VII. Significant Alternatives

There are no significant alternatives which would satisfy our goal of providing an allocation for a competitive interactive video and data service in the 218-218.5 MHz band. This proposal allows for flexibility in determining the specific allocation, sharing arrangements, and interactive video and data service uses that may ultimately be authorized to use this spectrum. We will not solicit applications to operate the service until rules and policies are finalized.

PAPERWORK REDUCTION ACT

30. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, 44 USC Sections 3501-3502, and found to impose a new or modified information collection requirements on the public. The benefit of proposing entry critieria and requiring construction benchmarks is to reduce the number of speculators who would hold the licenses and allow the spectrum to lie fallow awaiting the highest bidder. Implementation of any new or modified requirement will be subject to approval of the Office of Management and Budget as prescribed by the Act.

PROCEDURAL MATTERS

31. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 CFR Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 CFR Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 CFR Section 1.1203.

32. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 CFR Section 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation, 47 CFR Section 1.1206.

33. Any person who in making an oral *ex parte* presentation and presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

34. Authority for issuance of this Notice of Proposed Rule Making is contained in Sections 4(i), 303(c), (f), (g), and (r) of the Communications Act of 1934, as amended, 47 USC Sections 154(i), 303(c), 303(f), 303(g), and 303(r).

35. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR Sections 1.415 and 1.419, interested parties may file comments on or before **June 10, 1991** and reply comments on or before **July 10, 1991.** Extensions of time are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments and reply comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments must state the proceeding to which they relate (GEN Docket Number). They should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

36. For further information concerning this rule making contact Mr. Damon C. Ladson at (202) 653-8106, Office of Engineering and Technology, or Mr. William T. Cross at (202) 632-4964, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554.

37. A copy of this Notice of Proposed Rule Making will be forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PROPOSED RULE CHANGES

Parts 1, 2 and 95 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

A. Part 1 - PRACTICE and PROCEDURE

1. The authority citation for Part 1 continues to read:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 USC 154, 303; Implement, 5 USC 552, unless otherwise noted.

2. Section 1.926(a)(1) is revised to read as follows:

Section 1.926 Application for renewal of license.

(a) * * *

(1) Renewal of station or systems authorizations in the Private Land Mobile Radio Services (Part 90 of this Chapter), the General Mobile Radio Service (Part 95, Subpart A of this chapter), and Interactive Video and Data Services (Part 95, Subpart F of this chapter) shall be submitted on FCC Form 574-R when the licensee has received that form in the mail from the Commission. If the licensee has not received the Commission-generated Form 574-R within sixty (60) days of expiration, application for renewal of station or system license shall be submitted on FCC Form 405-A.

* * * * *

3. Section 1.951(c) is revised to read as follows:

Section 1.951 How applications are distributed:

* * * * *

(c) Special Services Branch. Aviation, Ground, Marine coast, Aircraft, Ship, General Radio, Interactive Video and Data.

* * * * *

4. Section 1.952(b) is amended by adding a catagory under the heading Personal Radio Services to read as follows:

Section 1.952 How file numbers are assigned

* * * * *

CA-General Mobile Radio Service
CV-Interactive Video and Data Service

* * * * *

5. Section 1.972(a)(1) is amended by adding "Part 95 - Personal Radio Services" at the end of the list and paragraph (c) is revised to read as follows:

Section 1.972 Grants by random selection.

(a)* * *

(1)* * * Part 95 -- Personal Radio Services.

* * * * *

(c) If there are mutually exclusive applications for an initial license for stations subject to Part 80 or Part 87, or if there are more applications for an initial license in Part 90, Part 94 or Part 95, Subpart F, than can be accommodated on available frequencies, the Commission may process the applications pursuant to a system of random selection. Each such random selection shall be conducted pursuant to an order issued by the Private Radio Bureau and under the direction of the Chief of the Bureau.

* * * * *

6. Section 1.1102 is amended by ading a new private radio service to the schedule of charges to read as follows:

Section 1.1102 Schedule of charges for private radio services.

Action	FCC form no.	Fee amount	Fee type code	Address
* * * * *				
14. Interactive Video and Data Stations:				
a. New Modification and/or Renewal (per system)	FCC 574			FCC, Attn: IVDS P.O. Box _____, Pittsburgh, PA 15251-
b. Assignment (per system)	FCC 703			FCC, Attn: IVDS Gettysburg, PA 17326
c. Renewal of License	FCC 574R, FCC405A			FCC, IVDS, P.O. Box _____, Pittsburgh, PA 15251-

* * * * *

B. PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS: GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 USC 154, 303, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended by listing footnote US317 in columns 4 and 5 and adding the use designator "Personal Radio Services (95)." for the 216.0-220.0 MHz band and adding the text of footnote US317 to the list of footnotes at the end of the table as follows:

Section 2.106 Table of Frequency Allocations

United States table		FCC use designators
Government Allocation (MHz) (4)	Non-Government Allocation (MHz) (5)	Rule Parts (6)
* * *	* * *	* * *
216-220 MARITIME MOBILE Aeronautical Mobile. Fixed. Land Mobile Radiolocation 627	216-220 MARITIME MOBILE Aeronautical Mobile. Fixed. Land Mobile 627	Private Land Mobile (90). Personal Radio Services (95).
US210 US229 US274 US317 G2	US210 US229 US274 US317 NG121	

* * * * *

United States (US) Footnotes

* * * * *

US317	The band 218.0-218.5 MHz is also allocated on a primary basis to the interactive video and data service.

* * * * *

C. Part 95 - PERSONAL RADIO SERVICES

1. The authority citation for Part 95 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 USC 154, 303.

2. Part 95 is amended by adding Subpart F to read as follows:

Subpart F-Interactive Video and Data Service (IVDS)

GENERAL PROVISIONS

Section 95.801 Scope.

The Interactive Video and Data Service (IVDS) is a real-time, response service to obtain personal video and data responses from television viewers and for use in conducting educational programming and polls, downloading data, and ordering services, products, and pay-per-view programming.

Section 95.803 IVDS system description.

Each IVDS system is comprised of a number of interconnected cells. Each cell contains one cell transmitter base station (CTS) and multiple in-home response transmitter units (RTUs). Each RTU is situated in the residence of a subscriber located in the cell.

Section 95.805 Permissible Communications.

Unless otherwise directed or conditioned in the applicable instrument of authorization, an IVDS system may be used for point-to-multipoint (CTS to RTUs) and mulitpoint-to point (RTUs to CTS) transmissions of video and digital information exchanges consistent with the scope of the IVDS.

SYSTEM LICENSE REQUIREMENTS

Section 95.811 License required.

Before any station transmits on any frequency segment authorized in the IVDS from any geographical location within the territorial limits of any area where radio services are regulated by the FCC, the responsible party must obtain a license from the FCC for an IVDS system. The written authorization that permits operation of an IVDS system is an IVDS system license (FCC Form 574) issued to the licensee. The term of the license is five years.

Section 95.813 License eligibility.

An entity is eligible to apply for an IVDS system license if:

(a) The entity is an individual who is not a representative of a foreign government;

(b) The entity is a partnership and no partner is a representative of a foreign government;

(c) The entity is a corporation organized under the laws of the United States of America.

(d) The entity is not a current licensee of an IVDS system in the system area for which the entity is applying.

(e) The entity has not had an IVDS license in the service area proposed in the application canceled for failure to meet the construction requirements specified in Section 95.831 of this Part.

Section 95.815 License application.

(a) Each application for an IVDS system license must be made on FCC Form 574. The application must be submitted to the Federal Communications Commission, Interactive Video and Data Service, P.O. Box 360***, Pittsburgh, PA 15251-***. Applications shall be personally signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; or by an officer or duly authorized employee, if the applicant is a corporation.

(b) A separate application form must be filed for each IVDS system. Each IVDS system application must specify the system service area in terms of a set of coordinates, and, if applicable, the Standard Metropolitan Statistical Area (SMSA) or city being served. (*See* Subpart A of this Part, Appendix B.)

(c) Each applicant must submit as part of the application a detailed plan indicating how the frequency segment requested will be utilized including the number and location of CTUs and how the proposed system will provide service to at least 50 percent of the area within the protected service area. In particular, the application must contain detailed descriptions of the modulation method, the channel time sharing method, any error detecting and/or correcting codes, any spatial frequency reuse system and the total data throughput capacity in each of the links in the system. Further, the application must include a separate analysis of the spectral efficiency including both information bits per unit bandwidth and the total bits per unit bandwidth.

(d) When mutually exclusive applications subject to section 309(b) of the Communications Act are filed or when there are more such applications for initial licenses than can be accommodated on available frequencies, the applications will be designated for random selection (*See* Section 1.972 of the Commission's Rules). An application which is substantially amended, (as defined by Section 1.962(c) of the Commission's Rules), will, for the purpose of this section, be considered to be a newly filed application as of the receipt date of the amendment. Mutual exclusivity will occur if the later application or applications are received by the Commission's offices in Gettysburg, PA (or Pittsburgh, PA) for applications requiring the fees set forth at Part 1, Subpart G of the rules in a condition acceptable for filing within 30 days after the release date of public notice listing the first prior filed application (with which subsequent applications are in conflict) as having been accepted for filing or within such other period as specified by the Commission.

Section 95.817 Application for renewal of license.

Renewal of systems authorizations in the Interactive Video and Data Service shall be submitted on FCC Form 574-R when the licensee has received that form in the mail from the Commission. If the licensee has not received the Commission-generated Form 574-R within sixty days of expiration, application for renewal of station or system license shall be submitted on FCC Form 405-A. All applications must be submitted to the Federal Communications Commission, Interactive Video and Data Service, P.O. Box 360***, Pittsburgh, PA 15251-***.

Section 95.819 License not transferable.

The licensee must not transfer, assign, sell or give the license for an IVDS system to any other entity except in accordance with the provisions of Section 95.821 of this Part. If the licensee sells or gives away the IVDS system equipment, the new owner must obtain a new licensee before using it.

Section 95.821 Application for assignment of license.

If the licensee of an IVDS system is a corporation, and there is a change in control of the corporation, the licensee must request consent for the change of control from the Commission on Form 703. The licensee shall mail the request to: Federal Communications Commission, Attention: IVDS, Gettysburg, Pennslyvania 17326. The document granting such consent must be kept as part of the IVDS system license.

SYSTEM REQUIREMENTS

Section 95.831 Contruction requirements.

Each IVDS system licensee must construct at least 10 percent of the proposed CTSs within one year of licensing and at least 60 percent of the proposed CTSs within five years of licensing or the license cancels automatically and must be returned to the Commission. The licensee shall file a progress report at the conclusion of each benchmark period to inform the Commission of the status of the system and shall address the report to: Federal Communications Commission, Special Services Branch, 1270 Fairview Road, Gettysburg, PA 17325-7245.

Section 95.833 Station identification.

RTUs and CTSs are not required to transmit a station identification announcement.

Section 95.835 Station inspection.

If an authorized Commission representative requests to inspect any station in an IVDS system, the licensee must make the station available.

Section 95.837 Operation in the National Radio Quiet Zone

Before establishing an IVDS system in any area within the National Radio Quiet Zone (see Section 95.41 of this Part) or before changing frequency segment, transmitter power, antenna height or directivity, or the coverage area of an existing IVDS system within any area within the

National Radio Quiet Zone, the licensee must give written notification thereof to the Interference Office, National Radio Astronomy Observatory, P.O. Box 2, Green Bank, WV 24944.

(a) The notification must include the geographical coordinates of the station antenna, antenna ground elevation above mean sea level, antenna center of radiation above ground level, antenna directivity, proposed frequency, type of emission, and transmitter power.

(b) If an objection to the proposed operation is received by the Commission from the National Radio Astronomy Observatory at Green Bank Pocahontas County, WV, for itself or on behalf of the Naval Research Laboratory at Sugar Grove, Pendleton County, WV, within 20 days from the date of notification, the Commission will consider all aspects of the problem and take whatever action is deemed appropriate.

Section 95.839 Operation near a Commission monitoring facility.

An IVDS system operating within 1.6 km (1 mile) of a Commission monitoring facility must protect that facility from harmful interference. Failure to do so could result in imposition of operating restrictions upon the operation of the system by the Engineer-in-Charge of the facility. (Geographical coordinates of the facilities that require protection are listed in Section 0.121(c) of the Commission's Rules.)

TECHNICAL STANDARDS

Section 95.851 Type Acceptance

Each CTS and each RTU in an IVDS system must comply with these technical standards. Every CTS and RTU must be type-accepted for use in the IVDS in accordance with Subpart J of Part 2 of the Commission's Rules.

Section 95.813 Frequency segments.

(a) Each CTS and each RTU in the same IVDS system shall transmit in the same assigned frequency segment.

(b) Frequency segment A is 218.0-218.250 MHz. Frequency segment B is 218.251-218.500 MHz.

(c) Each frequency segment will be protected solely on the basis of geographical separation. The minimum separation between assignments on the same frequency segment will be 128.8 km (80 miles) except where licensees agree that a lesser distance is sufficient.

(d) No licensee will be authorized an additional segment to operate within its service area.

(e) No license will be authorized for an IVDS system when the service area includes territory north of Line A and east of Line C (*See* Section 1.955 of the Commission's Rules).

Section 95.855 Interference Prevention

(a) Each licensee of an IVDS system suffering or causing harmful interference must cooperate and resolve the problem by mutually satisfactory arrangements. If the licensee is unable to do so, the FCC may impose restrictions including specifying the transmitter power, antenna height, or area or hours of operation of the stations concerned.

(b) The use of any frequency at a given geographical location may be denied when, in the judgment of the Commission, its use in that location is not in the public interest; the use of segment channel specified for IVDS may be restricted as to specified geographical areas, maximum power, or other operating conditions.

(c) The licensee of each IVDS system shall inform all households within a Grade B TV channel 13 viewing area of the potential for interference from an IVDS system.

(d) The licensee of each IVDS system shall provide and install free of charge an interference reduction device, such as a 218.25 MHz notch filter, to each household within a television channel 13 station Grade B contour that experiences interference due to the IVDS system, and requests such a device.

(e) The licensee of each IVDS system shall investigate and eliminate any interference to TV channel 13 broadcasting and reception, from its system, within 30 days of the time it is notified in writing, by either an affected television station, an affected viewer, or the Commission, of an interference complaint. Should the IVDS licensee fail to eliminate the interference within the 30 day period, the IVDS units causing the interference shall discontinue operation.

Section 95.857 Transmitter effective radiated power limitation.

(a) The effective radiated power of each CTS and RTU shall be limited to the minimum necessary for successful intercommunication. No CTS or RTU may transmit with an effective radiated power (ERP) exceeding 20 watts.

(b) For an IVDS system located in a TV channel 13 viewing area, the maximum ERP shall be limited as follows:

TV Channel 13 Service Area	Maximum CTS ERP
City Grade	20 watts
Grade A	7 watts
Grade B	1 watt
Grade B +2 miles	1 watt
Grade B +3 miles	3 watts
Grade B +4 miles	10 watts
Grade B +5 miles and beyond	20 watts

Section 95.859 Authorized emission types.

Transmissions by a CTS and a RTU shall be limited to emission type V1D.

Section 95.861 Emission standards.

All emissions shall be attenuated in accordance with the following schedule.

(a) On any frequency removed from the midpoint of the assigned frequency segment by more than 50 percent up to and including 150 percent of the authorized bandwidth: at least 25 dB;

(b) On any frequency removed from the midpoint of the assigned frequency segment by more than 150 percent up to and including 250 percent of the authorized bandwidth: at least 35 dB; and

(c) On any frequency removed from the midpoint of the assigned frequency segment by more than 250 percent of the authorized bandwidth: at least 43 plus 10 log (base 10) (mean power in watts) dB.

Section 95.863 Frequency Tolerance

Each CTS and RTU shall maintain a frequency tolerance of 0.0005 percent of the center frequency of the segment in which it is transmitting.

Section 95.865 Antennas.

(a) No CTS antenna shall be elevated higher than necessary to assure adequate service. No CTS antenna structure, including the radiating elements, tower, supports and all appurtenances, may exceed a maximum Height Above Average Terrain (HAAT), as defined in Section 90.309 of the Commission's Rules, of 36.6m (120 feet) within an area defined by a boundary line 16 km (10 miles) outside of the Grade B contour of a TV channel 13 station. When an antenna is located beyond 10 miles from a TV channel 13 Grade B contour, the HAAT shall not exceed 152.5m (500 feet).

(b) Each RTU antenna shall be an intergal part of the RTU.

APPENDIX B

Parties Filing Comments in Response to RM 6196:

1. American Radio Relay League, Inc. (ARRL).
2. Association of American Railroads (AAR).
3. Association of Maximum Service Telecasters (MST).
4. Association of Maximum Service Telecasters (MST) by Jules Cohen.
5. Better Vision.
6. Blue Grass Television Inc.
7. Booth American Company.
8. Briar Cliff College.
9. Cablecom, Inc.
10. Carolina Christian Broadcasting, Inc. (CCB).
11. Colstrip Cable TV Company.
12. Community Antenna Television Association, Inc. (CATA).
13. Cox Enterprises, Inc.
14. David Sarnoff Research Center.
15. East Tennessee Public Communications Corporation.
16. Edgemont Ranch dba Edgelook.
17. Educational Broadcasting Corporation (EBC).
18. Electronic Industries Association (EIA).
19. Essex-Communications Corporation.
20. Fairfield Industries, Inc.
21. Forest Industries Telecommunications (FIT).
22. Georgia Public Telecommunications Commission (GPTC).
23. Gordon Broadcasting, Inc.
24. Grand Alliance New York F/P.
25. H & C Communications, Inc.
26. Idaho State University.
27. Interactive Game Network, Inc.
28. International Teleconferencing Association (ITCA).
29. Iowa State University.
30. Jones Intercable, Inc.
31. KARK TV 4.
32. Kelly Television Co.
33. KHIB Stereo 92 FM.
34. Knight-Ridder Broadcasting, Inc.
35. KTRK, Inc.
36. Land Mobile Communications Council (LMCC).
37. Macoupin County Cablevision.
38. Masada Corporation.
39. Media Center.
40. Media General Cable of Fairfax County, Inc.
41. National Association of Broadcasters (NAB).
42. National Broadcasting Company (NBC).
43. National Cable Television Association, Inc. (NCTA).
44. New Vision Limited Partnership.
45. North Texas Public Broadcasting, Inc.
46. Northwest Illinois Cable Co.
47. Pacifica Communications Sciences, Inc.
48. Ponderosa Cable Co., Inc.
49. Prairie Public Broadcasting.
50. Pratt Institute.
51. Public Broadcasting Service (PBS).
52. Radio Telecom and Technology, Inc. (RTT).
53. Sinclair Broadcast Group.
54. Spirit Lake Cable TV, Inc. dba Lakes Cable Systems.
55. Steorts Electric Company
56. Thomson Consumer Electronics, Inc.
57. United Parcel Service of America, Inc. (UPS).
58. University of Arkansas at Monticello.
59. University of Colorado at Colorado Springs.
60. Viacom International Inc.

61. Waterway Communications System, Inc. (Watercom).

62. West Virginia Educational Broadcasting Authority (WVEBA).

63. Westport-York Associates.

64. Westinghouse Broadcasting Company, Inc.

65. WGH Piedmont 8.

66. WGTE-TV-FM & WULE-FM.

67. WTVI-TV.

68. WFAA Television, Inc.

And 31 Amateur Radio Operators.

Parties Filing Reply Comments in Response to RM 6196:

1. American Radio Relay League (ARRL).

2. The Association of Maximum Service Telecasters (MST).

3. Capital of Texas Public Telecommunications Council.

4. National Association of Broadcasters (NAB).

5. TV Answer Inc.

6. ARRL - motion to strike TVA's replies.

7. TV Answer Inc. - opposition to ARRL's motion.

8. ARRL - reply to TVA's opposition.

And 10 Amateur Radio Operators.

FOOTNOTES

[1] A list of the commenting parties is provided in Appendix B.

[2] Formerly the Association of Maximum Service Telecasters.

[3] These arguments were made in comments filed by Jules Cohen, P.C. (Cohen) as a supplement to MSTV's comments. Although Cohen's comments were filed one day late, we accept them as a supplement to MSTV's comments in the interest of obtaining a complete record.

[4] *See Opposition of Waterway Communications System, Inc. to Petition for Rule Making*, RM-6196 (February 29, 1988).

[5] *See Reply of TV Answer, Inc.*, RM-6196, filed May 4, 1990, and *Reply of TV Answer, Inc.*, RM-6196, filed July 13, 1990.

[6] *See Report of Field Measurement Attenuation Characteristics of TV Answer Transmitters and Engineering Statement*, RM-6196 (August 18, 1989), and *Supplemental Engineering Statement*, RM-6196 (September 8, 1989).

[7] *See Reply of TV Answer, Inc.*, RM-6196 (July 13, 1990), Attachment A at pages 3-6.

[8] *See Final Reply of TV Answer, Inc., supra.*

[9] *See Comments of MSTV*, RM-6196 (July 30, 1990).

[10] PRODIGY and COMPUSERVE are interactive services for personal computers that operate via the local telephone service.

[11] AMTS is an integrated and interconnected maritime communications system serving ship stations and offshore fixed platforms on the Mississippi River, its connecting waterways, and the offshore waters of the Gulf of Mexico. *See* 47 CFR Section 80.477. The AMTS band, 216-220 MHz, is divided into four groups of twenty 25 kHz paired coast and ship station channels: Group A, Group B, Group C, and Group D. *See* 47 CFR Section 80.475.

[12] The Group C and D coast station channels, spanning the range of 216-217 MHz, are closest in frequency to TV channel 13; the corresponding Group C and D ship stations occupy the 218-219 MHz band. Because of the potential to cause interference to TV channel 13 (210-216 MHz), Group C and D coast stations are not authorized within 169 kilometers of a TV channel 13 station. *See* 47 CFR Section 80.475. Consequently, there are no AMTS coast stations operating on the Group C and D channels. Thus, the paired Group C and D ship station channels are also unused. *See* 47 CFR Section 80.385.

[13] *See Notice of Proposed Rule Making*, GEN Docket No. 88-372, 3 FCC Rcd 4736 (1988).

[14] Pending the outcome of this proceeding, we will not license AMTS stations on Group C and D channels.

[15] *See* 47 CFR Sections 73.683 and 73.685 for a description of service contours.

[16] HAAT is the height of the center of the radiating element of the antenna above the average terrain. *See* 47 CFR Section 90.309(a) for the calculation method.

[17] A notch filter is a filtering device designed to attenuate a signal over a given bandwidth.

[18] The V1D emission class can be described as follows: a sequence of pulses, modulated by various means, consisting of a single channel of quantized or digital information without the use of a modulating sub-carrier, and transmitting data, telemetry, or telecommand.

[19] *See* 47 CFR Section 80.211.

[20] *See* 47 CFR Section 95.621(b).

[21] The term "exclusive" as applied herein to assignment of facilities means that a licensee is the only party authorized to use its assigned frequency in the geographic area it is licensed to serve.

[22] Alternatively, if we were to allocate the entire one megahertz at 218.0-219.0 MHz, we might provide two 500 kHz segments.

[23] *See* 47 CFR Part 94, Subpart F.

[24] The GMRS is one of the personal radio services. *See* 47 CFR Section 95.31.

[25] *See* 47 CFR Section 22.903.

[26] *See* Public Notice, 1 FCC Rcd 543 (1986).

[27] *See* 47 CFR Section 94.65.

[28] *See* 47 CFR Section 94.88.

[29] *See Notice of Proposed Rule Making*, GEN Docket No. 89-552, 4 FCC Rcd 8593 (1989).

[30] These construction benchmarks are similar to those proposed for nationwide SMR systems at 220 MHz and 900 MHz. *See Notice of Proposed Rule Making*, GEN Docket No. 89-552, 4 FCC Rcd 8593 (1989). *See* also, *Notice of Proposed Rule Making*, GEN Docket No. 89-553, 4 FCC Rcd 8673 (1989).

[31] Assignment would not be permitted unless the system is at least ten percent constructed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Larsen-Readfield Telephone Company
Monroe County Telephone Company
Solon Springs Telephone Company
Wittenberg Telephone Company

Requests for Waiver of
the Commission's Equal Access
Implementation Plan for Independent
Telephone Companies

MEMORANDUM OPINION AND ORDER

Adopted: February 19, 1991; Released: March 4, 1991

By the Chief, Common Carrier Bureau:

1. In this order, we grant a petition for waiver of the Commission's equal access rules filed by four independent telephone companies (ITCs). In the ITC Equal Access Order,[1] the Commission required ITCs to convert their end offices to equal access only if certain conditions were present. That order also established a timetable for conversion under certain circumstances. Strict timetables for conversion had been imposed upon the Bell Operating Companies (BOCs) under the Modification of Final Judgment (MFJ),[2] and upon the GTE operating companies (GTOCs) under the GTE Consent Decree.[3] The Commission recognized differences between the BOCs and ITCs with respect to the types of markets served, switching technologies employed, and financial resources available to undertake equal access conversion. Because of these differences, the Commission concluded that the timetables of the type imposed upon the BOCs would not be appropriate for the ITCs.

2. Instead, the Commission required ITCs to convert end offices equipped with stored program controlled (SPC) switches within three years of a reasonable request for conversion to equal access by an interexchange carrier. The Commission directed the ITCs to convert end offices with electromechanical switches as soon as practical but did not specify a timetable.[4] Moreover, the ITC Equal Access Order provided that ITCs may seek a waiver of the Commission's rules if they "can demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services." [5]

3. In this order, we consider a petition for waiver of the equal access implementation requirements filed by four independent phone companies in Wisconsin: Larsen-Readfield Telephone Company (Larsen-Readfield), Monroe County Telephone Company (Monroe), Solon Springs Telephone Company (Solon Springs), and Wittenberg Telephone Company (Wittenberg).[6] The petition states that the phone companies received requests in March 1988 for equal access conversion from the MCI Telecommunications Corporation (MCI).

4. According to the petition, the telephone companies received a letter from MCI in March 1988 requesting that they convert their facilities to equal access. Pursuant to the Commission's requirements, the companies are required to complete the equal access conversions by March 1991. The petitioners state that, for various reasons, they require additional time to complete the equal access conversions.

5. Larsen-Readfield and Monroe each request an additional sixteen months, until July 15, 1992, to implement equal access. Solon Springs requests an additional fourteen months, until May 13, 1992. Larsen-Readfield, Monroe, and Solon Springs state that they were acquired by Century Telephone Enterprises, Inc. on July 31, 1989. Petitioners state that Century subsequently notified MCI that it planned to complete conversion of the three ITCs outside of the three-year time period because Century had already committed extensive personnel and financial resources to converting the end offices of its other affiliates in Wisconsin and Michigan. Larsen-Readfield, Monroe, and Solon Springs state that the conversion to equal access of these other end offices entailed significant capital investment and exerted considerable pressure upon Century's equipment inventories and administrative and technical personnel.

6. Wittenberg requests an additional year, until March 1992. The company states that its Stromberg Carlson switches require several upgrades before they are capable of furnishing equal access. Wittenberg states that the switch manufacturer has delayed providing the necessary equal access software and hardware upgrades, and that the appropriate equipment and software will therefore not be delivered, installed, and tested until March 1992.[7] Wittenberg also states that it wants to condition its March 1992 conversion date upon timely receipt of Wisconsin Public Service Commission (WPSC) authority to incur the expenses necessary to convert to equal access.[8]

7. Based on our review of the record, we conclude that the requested waivers are in the public interest. Each of the petitioners has set forth specific circumstances justifying its request, and no one has opposed any of the requests.[9] MCI has agreed to the petitioners' proposed new completion dates for equal access conversion. Thus, we conclude that the companies have demonstrated that the timetable established by the Commission's rules is not feasible "except at costs that clearly outweigh potential benefits to users."[10]

8. Accordingly, IT IS ORDERED that the petition for waiver of the equal access implementation requirements, is GRANTED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, 100 FCC 2d 860 (1985) (*ITC Equal Access Order*).

[2] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982, *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983).

[3] *United States v. GTE Corp.*, 603 F. Supp. 730 (D.D.C. 1984).

[4] *See ITC Equal Access Order* at paras. 48-49.

[5] *Id.* at para. 50.

[6] We placed this request on Public Notice on November 13, 1990. *See* 5 FCC Rcd 6670 (1990).

[7] Wittenberg states that it initially requested a proposal for the upgrades from Stromberg Carlson in August 1989 but received a proposal that was inconsistent with its tandem configuration plans. Wittenberg states that after it received a revised proposal from Stromberg Carlson, Wittenberg ordered the appropriate equipment and software on June 6, 1990. Stromberg Carlson accepted the order by letter dated July 9, 1990.

[8] Wittenberg states that it expects to receive WPSC approval.

[9] The only comments received in response to this request were supportive. *See* United States Telephone Association Comments at 5.

[10] *See ITC Equal Access Order* at para. 50. By this order, we require Wittenberg to convert to equal access by March 1992. We decline to make this requirement contingent upon an action by the WPSC. Should Wittenberg conclude that it requires additional time to complete the conversion process, it is, of course, free to file another petition for waiver.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Alhambra-Grantfork
Telephone Company

Hager Telephone Company

Metamora Telephone Company

Hamilton Telephone Company

Montrose Telephone Company

Requests for Waiver of
the Commission's Equal Access
Implementation Plan for Independent
Telephone Companies

MEMORANDUM OPINION AND ORDER

Adopted: February 19, 1991; Released: March 4, 1991

By the Chief, Common Carrier Bureau:

1. In this order, we grant four of five petitions for waiver of the Commission's equal access rules filed by independent telephone companies (ITCs), and conclude that the remaining petitioner does not require a waiver of the equal access implementation requirements. In the ITC Equal Access Order,[1] the Commission required ITCs to convert their end offices to equal access only if certain conditions were present. That order also established a timetable for conversion under certain circumstances. Strict timetables for conversion had been imposed upon the Bell Operating Companies (BOCs) under the Modification of Final Judgment (MFJ),[2] and upon the GTE operating companies (GTOCs) under the GTE Consent Decree.[3] The Commission recognized differences between the BOCs and ITCs with respect to the types of markets served, switching technologies employed, and financial resources available to undertake equal access conversion. Because of these differences, the Commission concluded that the timetables of the type imposed upon the BOCs would not be appropriate for the ITCs.

2. Instead, the Commission required ITCs to convert end offices equipped with stored program controlled (SPC) switches within three years of a reasonable request for conversion to equal access by an interexchange carrier. The Commission directed the ITCs to convert end offices with electromechanical switches as soon as practical but did not specify a timetable.[4] Moreover, the ITC Equal Access Order provided that the ITCs may seek a waiver of the Commission's rules if they "can demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services." [5]

3. In this order, we consider five petitions for waiver of the equal access implementation requirements filed by Alhambra-Grantfork Telephone Company (Alhambra), Hager Telecom, Inc. (Hager), Metamora Telephone Company (Metamora), Hamilton County Telephone CO-OP (Hamilton),[6] and Montrose Mutual Telephone Company (Montrose).[7] Each of these independent telephone companies received a request for equal acess conversion in March 1988 from the same interexchange carrier, MCI Telecommunications Corporation (MCI). Pursuant to the Commission's requirements, the companies are required to complete the equal access conversions by March 1991. The petitioners state that, for various reasons, they require additional time to complete the equal access conversions.

4. Alhambra-Grantfork requests an additional year, until March 1992, to implement equal access. Alhambra states that the switch it now uses, the ITT TSC 5 switch, is obsolete and cannot be converted with software upgrades.[8] Alhambra states that it has begun accepting bids for a new digital switch. Alhambra states that it will be able to obtain, install, and test the new switch by March 1992.

5. Hager requests an additional nine months, until December 1991, to implement equal access. Hager states that it has experienced unanticipated delays in ordering and obtaining the software necessary to convert to equal access because it was involved in a contract dispute with the manufacturer, Stromberg Carlson, and the Rural Electrification Administration (REA). Hager states that it has ordered the necessary software from Stromberg, but does not expect delivery before April 1991. Hager states that it will need until December 1991 to install, test, and debug the software.

6. Metamora requests an additional 21 months, until December 3, 1992, to implement equal access. According to Metamora, a year before MCI's 1988 request, its corporate owner purchased another company, Marseilles Telephone Company (Marseilles). Metamora states that at the time of the purchase, Marseilles required considerable modernization and construction to provide quality basic telephone service, and its owner committed a substantial part of its financial and personnel resources to a five-year modernization effort for Marseilles. Metamora states that as a result of the modernization effort, Marseilles will be able to provide equal access. Metamora states that, after MCI's request, it received equal access software from the manufacturer in late 1989, and loaded a portion of the software into its switch, but that needed technical personnel were committed to the Marseilles modernization. Metamora states that the technical personnel will resume implementation of equal access in the first quarter of 1991, and install and test the equipment, and implement equal access by December 3, 1992. Metamora adds that MCI has agreed to the proposed date.

7. Hamilton requests an additional six months, until September 1991, to implement equal access. Hamilton states that it could provide more efficient and economical equal access if it changed its present configuration of two host and five remote switches to a one host and six remote switch configuration. Hamilton states that its new host switch will not be delivered until March 1991. Hamilton states that it will have obtained, installed, and tested the new switch by September 1991.

8. Montrose requests an additional fifteen months, until June 1992, to implement equal access. Montrose states that its existing electromechanical switch cannot be converted with software upgrades alone. Montrose states that

it has begun accepting bids for the necessary hardware, but will need until June 1992 to obtain, install and test the necessary equipment.

9. Based on our review of the record, we conclude that four of the five requested waivers are in the public interest. We also conclude that it is not necessary for Montrose to obtain a waiver of the equal access implementation requirements.[9] The petitioners have set forth specific circumstances justifying their requests, and no one has opposed any of the waiver requests.[10] MCI has agreed to the petitioners' proposed new completion dates for equal access conversion. Thus, we conclude that the companies have demonstrated that the timetable established by the Commission's rules is not feasible "except at costs that clearly outweigh potential benefits to users." [11]

10. Accordingly, IT IS ORDERED that the petitions for waiver of the equal access implementation requirements are GRANTED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, 100 FCC 2d 860 (1985) (*ITC Equal Access Order*).

[2] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982, *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983).

[3] *United States v. GTE Corp.*, 603 F. Supp. 730 (D.D.C. 1984).

[4] *See ITC Equal Access Order* at paras. 48-49.

[5] *Id.* at para. 50.

[6] We placed the requests of Alhambra, Hager, Metamora, and Hamilton on Public Notice December 28, 1990. *See* 5 FCC Rcd 7708 (1990).

[7] We placed Montrose's request on Public Notice January 9, 1991. *See* 6 FCC Rcd 296 (1991).

[8] Alhambra states that because the ITT TSC 5 switches are obsolete and only 13 are in operation nationwide, it cannot obtain any replacement parts. Alhambra also states that no technology has been developed to convert this type of switch to equal access.

[9] In the *ITC Equal Access Order*, the Commission stated that end offices equipped with electromechanical switches should be converted to equal access as soon as practicable, but did not specify a timetable. Thus, no waiver is necessary for Montrose to take more than three years after MCI's request to implement equal access.

[10] The only comments received in response to this request were supportive. *See* United States Telephone Association Comments at 2; National Telephone Cooperative Association Comments at 4; Organization for the Protection and Advancement of Small Telephone Companies Comments at 3.

[11] *See ITC Equal Access Order* at para. 50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket Nos. 84-352,
84-354 and 84-355

In re Applications of

PROGRESSIVE COMMUNICATIONS, INC.	File No. BPH-820512AP
MARY McFADDIN PYLE d/b/a MARYMC BROADCASTING CO.	File No. BPH-820524BB
BELL COUNTY BROADCASTING COMPANY	File No. BPH-820524BJ

For a Construction Permit for a
New FM Station at Temple, Texas

ORDER

Adopted: February 22, 1991; Released: March 5, 1991

By the Commission:

1. In an Order, *Progressive Communications, Inc.*, 5 FCC Rcd 7058 (1990), the Commission denied an Application for Review filed by MaryMc Broadcasting Co. Now before the Commission are a Petition for Reconsideration filed December 26, 1990 by MaryMc, an Opposition filed January 4, 1991 by Progressive Communications, Inc., and a Reply filed January 16, 1991 by MaryMc.

2. 47 C.F.R. § 1.106(b)(2) provides:

> Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present:
>
> (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or
>
> (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

3. In its petition for reconsideration, MaryMc continues to argue, as it did before the Board and in its application for review, that it had reasonable assurance of the availability of its proposed transmitter site in accord with applicable precedent. The Board's Decision, citing *Dutchess Communications Corp.*, 101 FCC 2d 243, 253-54 (Rev. Bd. 1985), fully considered MaryMc's arguments and concluded, based on a thorough analysis of the record, that MaryMc had fallen far short of demonstrating reasonable assurance of transmitter site availability. *Progressive Communications Inc.*, 3 FCC Rcd 5758 at 5759 ¶ 12 (1978). In its application for review, MaryMc argued that it had shown reasonable assurance of the availability of its proposed transmitter site. That application for review was denied by the Commission without stated reasons. 5 FCC Rcd at 7059. MaryMc's petition for reconsideration contains no arguments that rely on facts which relate to events that have occurred or circumstances that have changed since the filing of its application for review or which could not, with ordinary diligence, have been learned by MaryMc prior to the filing of that application for review. Nor do we find any basis otherwise to conclude that the Board's ruling on this issue was in error. Under these circumstances, the public interest will be best served by the dismissal of MaryMc's petition for reconsideration without further consideration.

4. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed December 26, 1990 by MaryMc Broadcasting Co. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-523

In re Applications of

CR BROADCASTING	File No. BPH-870918ME
SAGA COMMUNICATIONS OF ILLINOIS, INC.	File No. BPH-870918MS
DANIEL S. STRATEMEYER	File No. BPH-870918MZ

For a Construction Permit for a
New FM Station on Channel 271B1
Mt. Vernon, Illinois

ORDER

Adopted: February 25, 1991; Released: March 5, 1991

By the Commission:

1. In his *Initial Decision*, former Acting Chief Administrative Law Judge James F. Tierney (ALJ) granted the application of Daniel S. Stratemeyer to construct and operate a new FM station at Mt. Vernon, Illinois. *CR Broadcasting, Inc.*, 5 FCC Rcd 1232 (Admin. L.J. 1990). In doing so, the ALJ found that Stratemeyer was comparatively superior to both remaining applicants, CR Broadcasting, Inc. and Saga Communications of Illinois, Inc. (Saga), under both the diversification and integration criteria of the standard comparative issue. The Review Board affirmed the ALJ's decision. *CR Broadcasting, Inc.*, 5 FCC Rcd 5348 (Rev. Bd. 1990). Now before the Commission are: an Application for Review filed September 27, 1990 by Saga Commmunications of Illinois, Inc.; an Application for Review filed September 28, 1990 by CR Broadcasting, Inc.;[1] and an Opposition filed October 11, 1990 by Daniel S. Stratemeyer. We agree with the Board's resolution of this case.

2. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g), the Applications for Review filed September 27 and 28, 1990 by Saga Communications of Illinois, Inc. and CR Broadcasting, Inc., respectively, ARE DENIED.

3. IT IS FURTHER ORDERED, That the application of Daniel S. Stratemeyer (File No. BPH-870918MZ) for a construction permit for a new FM broadcast station in Mt. Vernon, Illinois IS GRANTED; and the applications of CR Broadcasting, Inc. (File No. BPH-870918ME) and Saga Communications of Illinois, Inc. (File No. BPH-870918MS) ARE DENIED; and this proceeding (MM Docket No. 88-523) IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] CR challenges the ALJ's disqualification of its proposal for failure to provide adequate city grade coverage pursuant to 47 C.F.R. § 73.315(a). It argues that the ALJ erred by failing to accept its transmitter site amendment. However, in light of Stratemeyer's superior position, both as to integration and diversification, resolution of the question posed by CR's application for review has no decisional relevance and, therefore, need not be considered further. *See* 5 FCC Rcd at 5349 ¶ 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-350

In re Applications of

LOCAL GIRLS and BOYS BROADCASTING CORP.	File No. BPH-880815MT
FUREY COMMUNICATIONS	File No. BPH-880816NM
BANTAM RIVER BROADCASTING, INC.	File No. BPH-880816NV

For Construction Permit for
New FM Station, Channel 247A,
Litchfield, CT

ORDER

Adopted: February 25, 1991; Released: March 6, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On January 18, 1991, as supplemented January 29, 1991, Bantam River Broadcasting, Inc. filed with the Review Board a Petition for Extraordinary Relief from various rulings made by the presiding Administrative Law Judge. Thereafter, the applicants in the proceeding entered into joint settlements which were subsequently approved by the Presiding Officer in *Memorandum Opinion and Order*, FCC 91M-681, released February 20, 1991. This action effectively moots the Bantam River pleadings pending before the Board.

2. ACCORDINGLY, IT IS ORDERED, That the Petition for Extraordinary Relief, filed January 18, 1991, as supplemented January 29, 1991, by Bantam River Broadcasting, Inc. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-559

In re Applications of

HARRISON COUNTY BROADCASTING CO. File No. BPH-860221MT

PRUITT AND OWEN File No. BPH-860218MQ

For a Construction Permit
For a New FM Station on Channel 229B
In Corydon, Indiana

Appearances

Robert S. Stone, Esq. on behalf of Harrison County Broadcasting Company; *Lauren A. Colby*, Esq. on behalf of Pruitt and Owen; and *Robert A. Zauner*, Esq. on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
JOHN M. FRYSIAK

Issued: February 26, 1991; Released: March 5, 1991

PRELIMINARY STATEMENT

1. By *Hearing Designation Order*, 4 FCC Rcd 8277 (1989) ("HDO"), and *Order* (89R-76) released December 6, 1989, the record in this proceeding was reopened and the above-referenced applications of Corydon Broadcasters, Limited ("CBL"), Harrison County Broadcasting Co. ("Harrison") and Pruitt and Owen ("P&O")[1] were remanded for hearing on the following issues:

> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. A prehearing conference was held on December 18, 1990, and evidentiary hearing sessions were held in Washington, D.C., on April 4 and 5, 1990. The record was closed on April 5, 1990 (Tr. 529).

3. On April 18, 1990, following the conclusion of the April 4 hearing, P&O filed a Motion to Enlarge Issues against Harrison, requesting that a financial issue predicated upon the bank commitment letter issued to Harrison, as well as an attendant misrepresentation issue, be added.

4. By *MO & O*, FCC 90M-1337, released May 24, 1990, the following issue was added:

> To determine whether Harrison County Broadcasting Company has reasonable assurance of the availability of sufficient funds for the construction and operation of its proposed station.

The requested issue of misrepresentation was denied since Ms. Poindexter had a bank commitment letter and there was no showing that she either knew or believed that it was inadequate.

5. Thereafter, a second hearing was held on July 9, 1990. At the conclusion of the July 9, 1990, hearing session the record was closed.

6. By *MO&O*, FCC 91M-07, released January 4, 1991, the Joint Motion for Approval of Agreement, filed December 17, 1990 by P&O and CBL was granted, the settlement agreement was approved, and the application of CBL was dismissed with prejudice.

FINDINGS OF FACT

Financial Qualification-Harrison

7. In its application filed February 20, 1986, Harrison certified that it was financially qualified to construct its proposed station and operate it for three months without reliance on advertising revenue (Harrison Ex. 7). The circumstances leading up to this certification were as follows. In January, 1986, Deborah M. Poindexter, Harrison's president, sole director and 100% stockholder, had met with her communications counsel, Rudolph L. Ennis, who developed with Ms. Poindexter an estimate of construction and operational costs in the amount of $212,000 (*Id.*). Ms. Poindexter then contacted the president of Citizens Bank, located in New Tazewell, Tennessee, ("Citizens Bank") William C. Lewis (*Id.*). She had known Mr. Lewis for several years having first met him during a social function held at a Knoxville, Tennessee Bank where she had been employed at the time (Joint Ex. 2, p. 5). Thereafter, she had seen him on a number of other occasions, the most recent occasion when she was employed at Sam's Wholesale Club in Knoxville, Tennessee (*Id.*, p. 8).

8. When Ms. Poindexter met with Mr. Lewis in early January, 1986, she discussed her plans for the station, and described the market involved, as well as studio and other equipment costs (Harrison Ex. 7, Tr. 607). She had with her a rough draft of her plan as well as a specimen loan commitment letter which her attorney had previously given her (Harrison Ex. 7, Tr. 606, Joint Ex. 2, p. 19, 20).

9. During their meeting Mr. Lewis asked Ms. Poindexter about her personal financial condition and her credit history (Harrison Ex. 7, Joint Ex. 2, 22). Ms. Poindexter did not have a balance sheet with her (*Id.*, p. 21). Ms. Poindexter advised Mr. Lewis that she felt she had sufficient funds to prosecute the application for the radio station, that her liabilities were minimal, and that while her personal assets were not substantial, her credit history was favorable (*Id.*, 22, Tr. 608-09). Mr. Lewis did not run a credit check on Ms. Poindexter on January 10, 1986 (Harrison Ex. 7, Joint Ex. 2, p. 24). In deposition testimony he stated that his usual practice was to require a balance sheet before making a loan (*Id.*) and to require at least two years income tax returns (*Id.* p. 24-25). He did not see Ms. Poindexter's tax returns (*Id.* p. 25).

10. Mr. Lewis, meanwhile, was under "somewhat of a mandate" to expand the bank's loan portfolio, given criticism by the bank's board of directors (Joint Ex. 2, p. 23).

Consequently, Mr. Lewis was anxious to find new good loans (*Id.*). On January 10, 1986, Mr. Lewis issued a loan commitment letter to Ms. Poindexter in the amount of $250,000 (Harrison Ex. 7).[2] The loan commitment, addressed to Ms. Poindexter, specified the amount of the loan, the specific use of the proceeds, the interest rate, repayment terms, collateral requirements, and conditions for final approval (*Id.*). At that time, it was Mr. Lewis' intention to follow up on the loan, provided everything went as planned (Joint Ex. 2, p. 23). At no time did Ms. Poindexter indicate to Mr. Lewis that the bank's loan commitment would not be considered serious or that all she needed was a letter to accommodate her application plans (Harrison Ex. 7).

11. In May, 1990, Ms. Poindexter and her current communications counsel, Robert S. Stone, began working on a formal written business plan for the construction and operation of the radio station (Tr. 614). While the original cost estimates developed in January, 1986 had been considered adequate, the revised business plan provides for additional equipment and operations well beyond the initial three months of operations for the station, including provision for sales commissions, payable based upon the amount of revenues generated (Harrison Ex. 7, Tr. 594, P&O Ex. 14). After the financial issue was designated against Harrison's application on May 24, 1990, the business plan was completed and was presented to Mr. Lewis (Harrison Ex. 7). In addition, Ms. Poindexter contacted The Central Trust Company, N.A. ("Central Trust"), located in Cincinnati, Ohio and First American National Bank in Knoxville, Tennessee (Harrison Ex. 7, Tr. 554). On June 18, 1990, Mr. Lewis wrote to Ms. Poindexter and stated that, due to changes in the bank's loan policy and the increased amount of the loan requested, Citizens Bank would no longer be able to pursue the project (Harrison Ex. 7, Joint Ex. 2, p. 17). Similarly, First American National Bank indicated that the project would be outside its trade area (Tr. 620). The Central Trust, meanwhile, did express an interest in the project. Ms. Poindexter spoke with John Thomas, Assistant Vice President for the bank by telephone and expressed her desire for financing the project (Tr. 555). Mr. Thomas agreed to review Harrison's business plan, which was forwarded to him by counsel for Harrison (P&O Ex. 12). Mr. Thomas then asked for and received a balance sheet from Harrison and Ms. Poindexter's personal financial statement (Tr. 556). These documents were furnished to Mr. Thomas by counsel for Harrison on June 18, 1990 (P&O Ex. 13). Ms. Poindexter's personal financial statement was prepared by her personally on a form obtained from Third National Bank in Knoxville, Tennessee and was signed and dated by her before it was sent by counsel for Harrison to Mr. Thomas (Tr, 584, 590). On June 21, 1990, The Central Trust issued its loan commitment to Harrison in the amount of $500,000, consistent with Harrison's revised business plan. The Central Trust loan commitment letter to Ms. Poindexter specifically identified the borrower, the amount of the proposed loan, how the proceed would be used, the interest rate to be charged, terms of repayment, collateral to be furnished, and conditions for final approval of the loan, all of which have been agreed to by Ms. Poindexter (*Id.*).

Standard Comparative Issue

Harrison County Broadcasting Company

12. Harrison is a Tennessee corporation organized for the purpose of owning and operating a commercial FM broadcast station to serve Corydon, Indiana. The corporation is organized for profit and is authorized to issue 1,000 shares of common, voting stock with no par value. The principals are (Harrison Ex. 1, p. 1).

Name/Address	Office Held	Shares Owned (Percentage)
Deborah M. Poindexter 10405 Victoria Drive, #1 Knoxville, TN 37922	President/Director	1,000 (100%)
Vickie B. Greene (nee Burchell) Route 4 Rutledge, TN 37862	Secretary/Treasurer	None (0%)

13. Neither Harrison nor Deborah M. Poindexter has any interest in, connection with or application for any commercial or non-commercial radio or television station, cable television system, newspaper, magazine or any other medium of mass communications. Harrison's only current activity relates to obtaining a construction permit from the FCC on Channel 299B at Corydon, Indiana (Harrison Ex. 1, p. 1; Ex. 2, p. 1).

14. Deborah M. Poindexter is a Black American female and U.S. citizen. Ms. Poindexter owns and votes 100% of the issued and outstanding stock of Harrison, and is president and sole director of Harrison. She asserts there are no other ownership interests in Harrison, whether voting or non-voting (Harrison Ex. 2, p. 1).

15. Ms. Poindexter proposes to serve as full-time general manager of Harrison's proposed station, and further proposes to devote a minimum of 40 hours per week to the above position. Ms. Poindexter further proposes to be the chief executive officer of the station and thus will have ultimate supervisory responsibility over all station operations, including the establishment and implementation of station policies, supervision and coordination of all department heads, financial management, program selection, employment policies, and general supervision of all station operations (Harrison Ex. 2, p.1).

16. To fulfill the above commitment, Ms. Poindexter asserts she will relocate her residence to Corydon in the event of a grant. She further asserts she will also withdraw fully from all current employment, business pursuits or other activities requiring her time or attention so as to fulfill her integration commitment. Ms. Poindexter shall seek qualitative enhancement credit as a minority female (Harrison Ex. 2, p. 1).

17. Ms. Poindexter learned of the availability of Corydon, Indiana FM Channel 299B from her communications counsel, Rudolph L. Ennis, when meeting with Mr. Ennis in order to learn what stations might be available for acquisition (Tr. 187). Ms. Poindexter formulated an informal business plan for her proposed station, and personally met with her proposed lender, the Citizens Bank, for the purpose of establishing her financial qualifications (Tr. 210). She personally opened Harrison's corporate account at a local bank in Knoxville using her own funds (Tr. 289-90). She was issued her shares of stock in

Harrison during the organizational meeting held September 1, 1986, which were paid for by her with her own funds (Tr. 291). While Ms. Poindexter has recently married, her husband will be moving with her to Corydon (Tr. 316-17). Following a revision of her business plan made in May of 1990, Ms. Poindexter secured a bank loan commitment letter from The Central Trust Company, N.A. of Cincinnati, Ohio. Her activities in this regard are listed in Finding No. 11, *supra*.

18. *Auxiliary Power.* Harrison proposes to acquire, install, and utilize, when necessary, auxiliary power generating equipment at both its transmitter site and studio location so as to assure continued service to its listeners in the event of a localized or generalized power failure (Harrison Ex. 3).

Pruitt and Owen

19. P&O is a general partnership, organized under the laws of the State of Kentucky, pursuant to the terms of a Partnership Agreement, executed January 1, 1986. The partnership consists of two partners: Lenn R. Pruitt, who has a 51% interest, and George E. Owen, Jr., who has a 49% interest (P&O Ex. 1).

20. Lenn R. Pruitt is the licensee and Business Manager of WJDJ(FM), Burnside, Kentucky (P&O Ex. 2, 4; Tr. 479). He is also president, a director and 100% shareholder of WKEQ Radio, Inc., licensee of WKEQ(AM), Burnside, Kentucky, and holds the position of Business Manager of that station (P&O Ex. 2, 4; Tr. 479). If granted a construction permit for a new FM broadcast station at Corydon, Mr. Pruitt will not divest himself of his interests in WKEQ(AM) or WJDJ-FM (P&O Ex. 4). WKEQ and WJDJ(FM) are the only stations licensed to Burnside, Kentucky (Tr. 489). At the time P&O's application was filed and until May 1, 1986, Mr. Pruitt was president, director and sole shareholder of Communications Ideas, Inc., then licensee of WIDS(AM), Russell Springs, Kentucky, at which he also held the position of business manager (P&O Ex. 4; Tr. 489).

21. George E. Owen, Jr. is president, a director and a 100% shareholder of Heartland Communications, Inc., licensee of WTCO(AM), WCKQ(FM) and low power TV station W04BP, all licensed to Campbellsville, Kentucky (P&O Ex. 4). Campbellsville, Kentucky is approximately 60-70 air miles from Corydon, Indiana (Tr. 484).

22. At the present time, Mr. Owen resides in Louisville, Kentucky. Mr. Owen has resided within the service area of the proposed station during the following years: May, 1944 to August, 1967 (with the exception of 1965, when he attended the University of Missouri), 1970-1976, and February, 1982 to the present. If granted a construction permit for a new FM broadcast station at Corydon, Indiana, Mr. Owen proposes to move to Corydon prior to going on the air with the new FM station (P&O Ex. 3).

23. George E. Owen, Jr., is presently self-employed with the Owen Company, Inc. (formerly Media Marketing), which is an advertising agency in Louisville and has been so employed since February of 1978. However, if granted a construction permit for Corydon, Mr. Owen proposes to terminate all employment with and divest his interest in the Owen Company, Inc., prior to going on the air with the Corydon FM station (P&O Ex. 3).

24. George E. Owen, Jr. was employed from August 1965 to December 1965 as a sales representative by WHEL(AM), New Albany, Indiana. From September, 1974 to May, 1977, he was employed as sales manager by WLRS-FM, Louisville, Kentucky. From May, 1977 to February, 1978, he was employed as sales manager by WINN(AM), Louisville, Kentucky (P&O Ex. 3).

25. Mr. Owen's civic activities not connected with his employment are as follows. Between 1975 and 1976, Mr. Owen was a youth director for the Fourth Presbyterian Church, Louisville ((P&O Ex. 3). This was a paid position (Tr. 521). He has been a deacon of the Calvin Presbyterian Church since 1986 (P&O Ex. 3; Tr. 518). The amount of time he devotes varies a great deal. With the exception of his participation on the Benevolence Committee (September 1987 through May, 1988), his activities as a deacon have either taken place on Sundays in the context of the worship services of the church, or on the first Monday night of each month, when the deacons have their regular monthly meeting (Tr. 519-21).

26. If granted a construction permit for a new FM broadcast station at Corydon, Indiana, Mr. Owen will terminate his present employment, move to Corydon and become employed fulltime, a minimum of 40 hours per week, at the proposed station as general manager. In his capacity as general manager, he will supervise all aspects of the station's operations, including the overall supervision of the station's sales, programming, engineering and clerical departments, personal direction of the station's relations with the community and with advertisers, the hiring and firing of all personnel, and the establishment of salaries. Additionally, Mr. Owen will administer the station's EEO program (P&O Ex. 3).

27. Lenn R. Pruitt resides in Greensburg, Kentucky. If granted a construction permit for a new FM broadcast station at Corydon, Indiana, Mr. Pruitt proposes to move to Corydon, prior to going on the air with the new FM station (P&O Ex. 2). However, his wife will not be moving with him. Mrs. Pruitt has proposed to be integrated into management and operation of a new Campbellsville, Kentucky, FM station in the event the application of Pruitt, Inc., of which she is a 50% shareholder and Mr. Pruitt is president, director and 50% shareholder, is granted (Tr. 483-84). Mr. Pruitt testified that he will reside in Corydon, Indiana, and work fulltime in the management of the Corydon station, while his wife is employed fulltime at the station in Campbellsville and resides in the Campbellsville area. Campbellsville is 60-70 air miles from Corydon. He testified that they intend to maintain a residence in Corydon and to retain their current residence in Greensburg, Kentucky, which is only seven miles from Campbellsville (Tr. 484-85, 490-91).

28. Although Mr. Pruitt has been employed at his radio stations in Burnside, Kentucky, WKEQ(AM) and WJDJ-FM, as business manager (P&O Ex. 2), he did not perform any of his functions on a day-to-day basis (Tr. 493). His functions were primarily to sign checks and approve large purchases, (Tr. 479) and he was involved in the day-to-day operations of the Burnside stations only by phone (*Id.*). Mr. Pruitt also testified that he had devoted time to his WIDS station as business manager only as needed, traveling to it for a day about twice a month (Tr. 480). If granted a construction permit for a new FM broadcast station at Corydon, Indiana, Mr. Pruitt proposes to become employed at the proposed station fulltime (a minimum of 40 hours per week) as program director and sales director (P&O Ex. 2).

29. Mr. Pruitt has never resided in nor participated in civic activities within the primary service area proposed by his application (Tr. 465). His broadcast experience as business manager for WIDS, Russell Springs, Kentucky and WKEQ/WJDJ, Burnside, Kentucky was limited to signing checks and approving large purchases only by phone, if needed (Tr. 479). Mr. Pruitt does not spend any time at the stations on a day-to-day basis (*Id.*). In fact, he held the position of business manager for all three radio stations at the same time (Tr. 480).

30. *Auxiliary Power.* P&O will install and utilize auxiliary power generating equipment at both its studio and transmitter sites for the purpose of providing continuous service to the community and the station's service area in the event of power outage or other emergency (P&O Ex. 6).

CONCLUSIONS

Financial Qualification-Harrison

31. As the findings indicate, Harrison certified as to its financial qualifications in its application. In May of 1990 a financial qualification issue was specified against Harrison (*MO & O*, FCC 90M-1337), because it was not clear from the bank commitment letter from the Citizens Bank upon which Harrison was relying whether the bank considered the financial position of Harrison's sole principal, Deborah M. Poindexter.

32. Also in May of 1990, Harrison began to work on a formal written business plan and revised the original cost estimates developed in January, 1986, although it believed the original cost estimate to be adequate. The revised business plan provides for additional equipment and operations beyond the initial three months of operations including provision for sales commissions. Harrison forwarded its revised business plan to the Citizen Bank and to two other banks. The Citizens Bank backed off the revised proposal in light of Harrison's increased needs as well as the bank's changes in loan policy. Of the other two banks, the Central Trust did express an interest in the project. Ms. Poindexter spoke by telephone with the bank's vice president. The bank reviewed Harrison's business plan, its balance sheet and Ms. Poindexter's personal financial statement. Subsequently, the Central Trust bank issued its loan commitment letter to Harrison in the amount of $500,000 consistent with Harrison's revised business plan.

33. The record evidence confirms that Harrison's currently proposed lending institution had before it all information about Ms. Poindexter individually and Harrison's proposed operation necessary to satisfy the Commission's "reasonable assurance" standard. (*See Albert E. Gary*, 5 FCC Rcd 6235, 6237 (Rev. Bd. 1990); *Scioto Broadcasters Limited Partnership*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990). The record evidence also confirms that the tentative terms of the potential loan have been specified and that Central Trust has a present firm intent to make the loan, subject to future review. *See Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751 (1990).

34. P&O's argument that Central Trust terms concerning the collateral that will be required are indistinct is without merit. The bank clearly requires a first lien security interest in assets used in the operation of the station and 100% of the outstanding shares of the corporate stock "or (in lieu thereof) other collateral satisfactory to the bank together with personal guarantees". The record evidence discloses that Harrison has accepted the terms and conditions of the proposed loan. The reference to personal guarantors refers to those who might post "other collateral," and does not apply to the situation when a first lien security interest in the assets used in the operation of the station is granted.

35. Although the Central Trust loan commitment letter indicates that Harrison is currently financially qualified, the question remains whether Harrison was in fact financially qualified when it certified that it was financially qualified. *See Shawn Phalen*, 5 FCC Rcd 2622 (Rev. Bd. 1990).

36. The Review Board has held [3] that where an applicant is relying on a bank loan, the applicant must show:

> Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-StateCommunications, Inc. v. FCC*, 590 F. 2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms).

37. The deposition testimony of William C. Lewis, Citizens Bank president, indicates that Harrison has met this Review Board test. Ms. Poindexter did furnish to Mr. Lewis all of the information on which she based her financial qualifications. When she met with Mr. Lewis she discussed her business plan. She had with her a rough outline she had prepared when developing cost estimates. She provided Mr. Lewis with the cost estimates and discussed her personal financial conditions as to her assets and credit history. She indicated that she had sufficient funds to prosecute Harrison's application for the radio station. It is true that Ms. Poindexter supplied her financial history orally and that it would have been neater had Mr. Lewis appraised written materials. However, the fact that the financial presentation was oral does not belie Ms. Poindexter's credit worthiness. Mr. Lewis was acquainted with Ms. Poindexter and had ample opportunity to assess her position.

38. P&O argues that Ms. Poindexter's financial stability was so marginal that her certification as to financial qualification is simply not creditable, that no bank would commit funds based on it.[4] The argument, of course, is unsupported by any evidence. Citizens Bank did issue a commitment letter. The loan commitment specified the amount of the loan, the specific use of the proceeds, the interest rate, repayment terms, collateral requirements and conditions for final approval. Mr. Lewis was deposed and P&O had an opportunity to elicit testimony as to the bank commitment letter's genuineness and none of the testimony elicited controverts the bank commitment letter's genuineness.

39. Additionally, Mr. Lewis indicated that at the time the commitment letter was issued the bank's board of directors wanted the bank to expand the bank's loan portfolio. Mr. Lewis was anxious to find new good loans and believed that the proposed loan to Harrison was of such ilk. It was Mr. Lewis' intention to follow up on the loan. It is deemed that the Citizens Bank loan commitment meets the Commission's standards (*see Northampton Media Associates*, 4 FCC Rcd 5517 (1989); *Shawn Phalen*, 5 FCC Rcd 4669 (1990); *Albert E. Gary*, 5 FCC Rcd 6235 (1990)), and it is concluded that Harrison is currently financially qualified to construct and operate the proposed station and also was so qualified when it filed its application. The financial qualification issue specified against Harrison IS RESOLVED in its favor.

Standard Comparative Issue

Harrison

40. Neither Harrison nor Ms. Poindexter owns any media interest. Consequently, Harrison is not charged with a comparative demerit under the Commission's diversification criterion.

41. Harrison is entitled to 100% integration credit for the full-time integration into management of Ms. Poindexter. Ms. Poindexter is the sole person involved in the Harrison application. There is no evidence to the contrary. P&O argues that Ms. Poindexter's lapses in memory at the various stages of testimony in this proceeding cast aspersions on the likelihood of Ms. Poindexter effectuating her commitment. The argument is rejected. This proceeding lasted over a long period of time. Ms. Poindexter was cross-examined on four separate occasions and issued numerous declarations. Under the circumstances, Ms. Poindexter's mental lapses are deemed excusable. The record reflects that Ms. Poindexter is ready, willing and able to effectuate her proposal to manage the day-to-day affairs of Harrison's proposed radio station.

42. Harrison's integration credit is qualitatively enhanced by Ms. Pointer's minority and female status and her proposed local residence.

Pruitt and Owen

43. P&O must be assessed a substantial diversification demerit. P&O principals have attributable interests in five radio stations and one LPTV station. Thus P&O is charged with George Owen's attributable 100% ownership interest in Heartland Communications, Inc., licensee of WTCO(AM), WCKQ(FM) and LPTV station WO4BP, all licensed to Campbellsville, Kentucky, a community located 60-70 air miles from Corydon, Indiana. In addition, P&O is charged with the attributable 100% interests of Lenn Pruitt in WKEQ(AM) and WJDJ(FM), both licensed to Burnside, Kentucky, and WIDS(AM), Russell Springs, Kentucky.

44. P&O is entitled to receive 49% integration credit for the full-time integration proposal of George Owen. However, the full-time integration proposal of Lenn Pruitt is not credible. The Pruitts intend to maintain separate residences in the event both of their applications are granted. The residences would be 60 air miles apart. In light of this, plus the fact that Lenn Pruitt's co-general business partner will be general manager of the P&O proposed station and considering Mr. Pruitt's work habits and the amount of time Mr. Pruitt has spent as business manager for WIDS and WKEQ/WJDJ, the likelihood of Mr. Pruitt effectuating his *full-time* day-to-day proposal at Corydon is not deemed likely. P&O is not entitled to any credit for Mr. Pruitt's integration proposal.

45. George Owen's integration proposal is qualitatively enhanced by prior service area residence and, to a slight degree, past participation in service area non-work related civic activities, *see*, *William M. Piner*, 5 FCC Rcd 441 (1990), and, by his broadcast experience to a slight degree.

Auxiliary Power

46. Both Harrison and P&O's comparative positions are enhanced by their respective proposals to acquire and utilize auxiliary power generating equipment.

ULTIMATE CONCLUSIONS

47. Harrison is the clear winner. It enjoys a substantial preference over P&O under the Commission's diversification criterion. Harrison also has a decisive quantitative preference for its proposal to integrate its principal into full-time day-to-day management -- (100% vs. 49%). The quantitative preference being decisive there is no need to compare the applicants qualitatively.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Harrison County Broadcasting Co. (File No. BPH-860221MT) for a Construction Permit for a New FM Station on Channel 229B at Corydon, Indiana, IS GRANTED, and the application of Pruitt and Owen (File No. BPH-860218MQ) IS DENIED[5]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTES

[1] On August 28, 1989, dismissed applicant, Lopez Radio, Inc. (File No. BPH-860221MO), filed a Petition for Reconsideration, directed to the Full Commission with respect to the affirmation of the dismissal of its application in *Special Markets Media, Inc.*, 4 FCC Rcd 5753 (1989), which Petition for Reconsideration is currently pending.

[2] The Citizens Bank loan commitment letter reads as follows:

> Dear Ms. Poindexter:
>
> This will confirm our recent discussion relative to your plans for constructing and operating a new FM radio station to serve the community of Corydon, Indiana on 107.7 mHz. We have reviewed your proposal and by this letter we wish to confirm our willingness to extend to you a line of credit of up to $250,000.00, in th event your application for the above facility is granted by the FCC.
>
> The exact terms of the loan will, of course, be determined at the exact time the loan is made and will depend on conditions as they then exist, as well as a final review by our board at the time you desire the funds. At the

present time, however, we would anticipate that such a line of credit would provide for a repayment over a term of ten years in equal yearly installments at the then prevailing interest rate, with such installments to begin 90 days after operations begin. (Interest rates for such loans now stand at 11%). As security for the loan, we would require a security interest in all of the assets of your proposed station, and your personal guarantee, which you have indicated you will provide. In that regard, we are aware that you may wish to lease some of your equipment. We also understand that FCC rules require that control over a broadcast station must remain with the licensee until the FCC has approved a transfer of such control.

We understand that for purposes of your application, you are required only to show the reasonable assurance of your access to financing and that you do not require nor presently desire a legally binding commitment for which this bank would charge a fee. Accordingly, the final decision on the availability of the loan and its terms will of necessity be made at the time the loan is actually to be funded and will depend on our review of your financial condition and proposal at that time as well as this bank's then current lending policies and general financial market conditions.

Further, any such loan would, of course, also be subject to execution of a formal loan agreement of the type the bank customarily requires for such loans. Because we are not now making a legally binding loan commitment, we would request 90 days notice of when you would like the loan funded so that we may have sufficient time to complete our review and prepare the necessary documents.

Your application and presentation of plans for your broadcast facility were very well done. We appreciate the opportunity to work with you on this proposal and wish you success with your application.

[3] *Albert E. Gary*, 5 FCC Rcd 6235, 6237 (1990).

[4] P&O refers only to the immediate past two years of Ms. Poindexter's financial history.

[5] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-38

In re Applications of

LEON F. PETTERSON (hereafter "Petterson") — File No. BPH-891002MK

MARSHALL W. ROWLAND, SR. (hereafter "Rowland") — File No. BPH-891002MM

SUWANNEE BROADCAST, INC. (hereafter "Suwannee") — File No. BPH-891002MO

For Construction Permit for a New FM Station on Channel 291A (106.1 MHz) in Live Oak, Florida

HEARING DESIGNATION ORDER

Adopted: February 19, 1991; Released: March 5, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Petterson and Suwannee.* In the *Notice of Proposed Rule Making and Order to Show Cause*, MM Docket No. 90-214, 5 FCC Rcd. 2685 (1990), the Commission, at the request of Lakeland Broadcasters, Inc., permittee of station WHFE(FM), Lakeland, Georgia, proposed the substitution of Channel 290C3 for Channel 290A, and the modification of WHFE's construction permit (BPH-870910NV) to specify the higher class station. Both Petterson's and Suwannee's applications are short-spaced to the proposed Channel 290C3. Nonetheless, the applicants will be allowed to proceed to comparative hearing. However, it shall be ordered, that in the event either Petterson or Suwannee is successful in the instant proceeding, the construction permit issued shall be contingent on the outcome of the Commission's Rule Making proceeding in MM Docket No. 90-214.

3. *Suwannee.* In an amendment filed on January 26, 1990, Suwannee reported "the conversion of the instant application from an individual applicant owned by Ray W. Forrester to a corporation controlled by Mr. Forrester." The amendment also added Molly S. Cato as Secretary, Treasurer, Director and 20% stockholder of the applicant. While the amendment notes that Ms. Cato has no other broadcast interests, the amendment failed to provide pages 4 and 5 of Section II (Items 7-12) pertaining to Ms. Cato's legal qualifications. Accordingly, Suwannee will be required to submit this information to the presiding Administrative Law Judge within 30 days of the release of this Order.

4. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Petterson	March 9, 1990
Rowland	June 4, 1990

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That any construction permit awarded to either Petterson or Suwannee, as a result of this proceeding, shall be made contingent on the outcome of the Commission's Rule Making proceeding in MM Docket No. 90-214.

8. IT IS FURTHER ORDERED, That Suwannee shall submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order which contains the information required by pages 4 and 5 of Section II of FCC Form 301.

9. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Petterson and Rowland ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Di-

vision, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-440

In the Matter of

Amendment of Section 73.202(b), RM-7452
Table of Allotments,
FM Broadcast Stations.
(Central Valley, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 26, 1991; Released: March 6, 1991

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 5880 (1990), issued in response to a petition filed on behalf of Quality Broadcasters of California, L.P. ("petitioner"), licensee of Station KNNN(FM), Channel 257A, Central Valley, California, proposing the substitution of Channel 257C3 for Channel 257A and the modification of its license to specify operation on the higher-powered channel. Petitioner filed comments in support of the proposal. No other comments were received.

2. Channel 257C3 can be allotted to Central Valley, California, at the petitioner's current site[1] consistent with the minimum distance separation requirements of the Commission's Rules.

3. We believe the public interest would be served by substituting Channel 257C3 for Channel 257A at Central Valley, California, since it would provide an expanded coverage FM service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station KNNN(FM) to specify operation on Channel 257C3 at Central Valley, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Central Valley, California	257C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to Quality Broadcasters of California, L.P. for Station KNNN(FM), Central Valley, California, IS MODIFIED to specify operation on Channel 257C3 in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates at the licensed site of Station KNNN(FM) are 40-33-46 and 122-27-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-49

In the Matter of

Amendment of Section 73.202(b), RM-7599
Table of Allotments,
FM Broadcast Stations.
(Sheboygan Falls, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 26, 1991; Released: March 6, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by WKTS, Inc. ("petitioner"), seeking the allotment of Channel 229A to Sheboygan Falls, Wisconsin, as that community's first local service. Petitioner provided an engineering study in support of the petition and indicated it would apply for the channel, if allotted.

2. We believe the proposal warrants consideration because the proposed allotment would provide a first local broadcast service to Sheboygan Falls, Wisconsin. Channel 229A can be allotted to Sheboygan Falls, Wisconsin, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 2.1 kilometers (1.3 miles) east of the community.[1] The site restriction will prevent a short-spacing to an application for Channel 283A, Plymouth, Wisconsin (BPH-880825MB).

3. In view of the above, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Sheboygan Falls, Wisconsin	---	229A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 29, 1991,** and reply comments on or before **May 14, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Marshall E. Harris,
President
WKTS, Inc.
P.O. Box 1045
Sheboygan Falls, Wisconsin
53081
(Petitioner)

Larry G. Fuss
Contemporary
Communications
P.O. Box 159
Fayetteville, Georgia 30214
(Consultant to the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 229A are 43-43-30 and 87-47-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-568

In the Matter of

Amendment of Section 73.202(b), RM-7476
Table of Allotments,
FM Broadcast Stations.
(Barbourville, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 25, 1991; Released: March 6, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6972 (1990), issued in response to a petition for rule making filed by Barbourville Community Broadcasting Company ("petitioner"), licensee of Station WYWY(FM), Channel 241A,[1] Barbourville, Kentucky, proposing the substitution of Channel 241C3 for Channel 241A at Barbourville, and modification of its license to specify the higher powered channel. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 241C3 for Channel 241A at Barbourville, since it could provide a wide coverage area FM service to the community. Channel 241C3 can be allotted to Barbourville in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.8 kilometers (1.7 miles) west,[2] in order to avoid a short-spacing to Station WMXK(FM), Channel 240A, Morristown, Tennessee. We will modify the license of Station WYWY(FM) to specify operation on Channel 241C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Barbourville, Kentucky	241C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WYWY(FM), Barbourville, Kentucky, IS MODIFIED, to specify operation on Channel 241C3 in lieu of Channel 241A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] WYWY(FM) currently operates on Channel 228A at Barbourville, Kentucky. Its license was modified by *Report and Order* in MM Docket No. 87-494, 5 FCC Rcd 5705 (1990), to specify operation on Channel 241A.

[2] The coordinates for Channel 241C3 at Barbourville are North Latitude 36-52-32 and West Longitude 83-55-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-546

In the Matter of

Amendment of Section 73.202(b), RM-7526
Table of Allotments,
FM Broadcast Stations.
(Live Oak, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 25, 1991; Released: March 6, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6727 (1990), issued in response to a petition for rule making filed by Day Communications, Inc. ("petitioner"), licensee of Station WQHL(FM), Channel 251C2, Live Oak, Florida, proposing the substitution of Channel 251C1 for Channel 251C2 at Live Oak, Florida, and modification of its license for Station WQHL(FM) to specify operation on Channel 251C1. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 251C1 for Channel 251C2 at Live Oak, since it could provide a wide coverage area FM service to the community. Channel 251C1 can be allotted to Live Oak in compliance with the Commission's minimum distance separation requirements with a site restriction of 23.5 kilometers (14.6 miles) southwest,[1] in order to avoid a short-spacing to a construction permit for Station WUVU-FM, Channel 250C2, St. Augustine, Florida, and a pending proposal to allot Channel 254A to Statenville, Georgia. *See* MM Docket No. 90-214, 5 FCC Rcd 2685 (1990). We will modify the license of Station WQHL(FM) to specify operation on Channel 251C1 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Live Oak, Florida	251C1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WQHL(FM), Live Oak, Florida, IS MODIFIED, to specify operation on Channel 251C1 in lieu of Channel 251C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 251C1 at Live Oak are North Latitude 30-07-02 and West Longitude 83-07-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-577

In the Matter of

Amendment of Section 73.202(b), RM-7507
Table of Allotments,
FM Broadcast Stations.
(Georgetown, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 25, 1991; Released: March 6, 1991

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of Kentucky Radio Limited Partners ("KRLP"), licensee of Station WTKT(FM), Channel 276A, Georgetown, Kentucky, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 7145 (1990), proposing the substitution of Channel 277A for Channel 276A at Georgetown, Kentucky, and the modification of its license for Station WTKT(FM) to specify the alternate Class A channel. KRLP filed comments restating its intention to apply for Channel 277A, if allotted. Capitol Broadcasting Corporation ("Capitol"), licensee of Station WKRA(FM), St. Matthews, Kentucky, filed supporting comments.

2. Capitol supports the substitution of Channel 277A for Channel 276A at Georgetown. Capitol states that Station WKRA is short-spaced to Station WTKT at its present channel, and the proposed change would eliminate the short-spacing. Capitol also notes that KRLP's proposal will permit Station WKRA(FM) to increase its service area.

3. We believe the public interest would be served by substituting Channel 277A for Channel 276A at Georgetown, Kentucky, since it would eliminate grandfathered short-spacings between Station WTKT and Station WKRA, and between Station WTKT and Station WRAC, West Union, Ohio. In addition, the substitution will enable Station WTKT to increase its service area. Channel 277A can be allotted to Georgetown in compliance with the Commission's minimum distance separation requirements at Station WTKT's current licensed site, with a site restriction of 10.8 kilometers (6.7 miles) south[1] of the community. As proposed, we are modifying the license of Station WTKT(FM) to specify Channel 277A in lieu of Channel 276A.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Georgetown, Kentucky	277A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WTKT(FM), Georgetown, Kentucky, IS MODIFIED, to specify operation on Channel 277A in lieu of Channel 276A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license (BLH-880121KB) except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license (BLH-880121KB) except for the channel as specified above and a license application (FCC Form 302/341) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 277A at Georgetown are North Latitude 38-06-57 and West Longitude 84-31-19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-469

In the Matter of

Amendment of Section 73.202(b), RM-7428
Table of Allotments,
FM Broadcast Stations.
(Tuscaloosa, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 26, 1991; Released: March 6, 1991

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 6274 (1990), issued in response to a petition filed on behalf of New South Radio, Inc. ("petitioner"), licensee of Station WACT-FM, Channel 288A, Tuscaloosa, Alabama, proposing the substitution of Channel 288C3 for Channel 288A and the modification of its license to specify operation on the higher-powered channel. Petitioner filed comments in support of the proposal. No other comments were received.

2. Channel 288C3 can be allotted to Tuscaloosa, Alabama, in conformity with the minimum distance separation requirements of the Commission's Rules at the petitioner's specified site, located 19.3 kilometers (12 miles) northeast of the community,[1] to avoid a short-spacing to Station WVCA(FM), Channel 287C2, Selma, Alabama.[2] We recognize that the allotment of Channel 288C3 to Tuscaloosa conflicts with the presently licensed operation of Station WWZQ-FM on Channel 288A at Aberdeen, Mississippi. However, the license of Station WWZQ-FM has been modified to specify Channel 287C3, and the station has been issued a construction permit on the new channel (BPH-901101JH). *See* 5 FCC Rcd 1777 (1990).

3. We believe the public interest would be served by substituting Channel 288C3 for Channel 288A at Tuscaloosa, Alabama, since it would provide an additional expanded coverage FM service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station WACT-FM to specify operation on Channel 288C3, at Tuscaloosa, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Tuscaloosa, Alabama	225C1, 239C1, 288C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to New South Radio, Inc. or Station WACT-FM, Tuscaloosa, Alabama, IS MODIFIED to specify operation on Channel 288C3 in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the petitioner's specified site for Channel 288C3 are 33-20-00 and 87-25-39.

[2] Coordinates at the authorized site of Station WVCA(FM) at Selma are 32-17-14 and 87-14-38 (File No. BMPH-890717ID).

Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDAMERICAN LONG
DISTANCE COMPANY,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY — File No. E-89-403
and
WISCONSIN BELL TELEPHONE COMPANY, — File No. E-89-404
Defendants.

ORDER

Adopted: February 28, 1991; Released: March 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989, MidAmerican Long Distance Company (hereinafter "MidAmerican") filed with the Commission the above-captioned formal complaints against Michigan Bell Telephone Company and Wisconsin Bell Telephone Company (hereinafter the "Defendants") seeking to recover damages for Defendants' alleged overearnings on interstate access services for the period October 1, 1985 through December 31, 1986. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed answers to the complaints.

2. The parties to the above-captioned complaints have conducted discussions aimed at settling matters in controversy. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies between the parties was reached. On February 6, 1991, the parties filed a joint motion seeking dismissal of the complaints with prejudice. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss the above-captioned complaints IS GRANTED and that the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ONE CALL
COMMUNICATIONS, INC.,
Complainant,

v.

INDIANA BELL TELEPHONE COMPANY,	File No. E-90-200
MICHIGAN BELL TELEPHONE COMPANY	File No. E-90-201
and OHIO BELL TELEPHONE COMPANY,	File No. E-90-202

Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: February 28, 1991; Released: March 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1.On May 18, 1990, One Call Communications, Inc., (hereinafter "One Call") filed with the Commission the above-captioned formal complaints against Indiana Bell Telephone Company, Michigan Bell Telephone Company and Ohio Bell Telephone Company (hereinafter the "Defendants") seeking to recover damages for Defendants' alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed answers to the complaints.

2.The parties to the above-captioned complaints have conducted discussions aimed at settling matters in controversy. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies between the parties was reached. On February 6, 1991, the parties filed a joint motion seeking dismissal of the complaints with prejudice. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3.Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss the above-captioned complaints IS GRANTED and that the proceedings ARE TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL
TELECOMMUNICATIONS
CORPORATION,
Complainant,

v.

UNITED TELEPHONE COMPANY OF INDIANA, INC. and UNITED TELEPHONE COMPANY OF OHIO,
Defendants.

File No. E-90-343
File No. E-90-344

ORDER

Adopted: February 28, 1991; Released: March 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Litel Telecommunications Corporation ("Litel") filed with the Commission the above-captioned formal complaints against United Telephone Company of Indiana, Inc. and United Telephone Company of Ohio (hereinafter the "Defendants") seeking reimbursement and other appropriate relief for interstate access charges levied by the Defendants against Litel during the period January 1, 1987 through December 31, 1988. On February 6, 1991, however, Litel filed motions for leave to withdraw the complaints, stating that it does not wish to pursue its claims against the Defendants.

2. On the basis of the statements contained in the Motions, we conclude that the public interest would be served by granting Litel's motions.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Litel's Motions for Leave to Withdraw Complaint ARE GRANTED and that the above-captioned proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER
NETWORK
COMPANY,
Complainant,

v. File No. E-90-285

UNITED TELEPHONE
COMPANY OF
INDIANA, INC.,
Defendant.

ORDER

Adopted: February 28, 1991; Released: March 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Charter Network Company ("Charter") filed with the Commission the above-captioned formal complaint against United Telephone Company of Indiana, Inc. (hereinafter "United") seeking reimbursement and other appropriate relief for interstate access charges levied by United against Charter during the period January 1, 1987 through December 31, 1988. On February 6, 1991, however, Charter filed a motion for leave to withdraw the complaint, stating that it does not wish to pursue its claim against United.

2. On the basis of the statements contained in the Motion, we conclude that the public interest would be served by granting Charter's motion.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Charter's Motion for Leave to Withdraw Complaint IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOM*USA, INC.
and its operating
subsidiaries,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY and WISCONSIN BELL TELEPHONE COMPANY,
Defendants.

File No. E-90-349
File No. E-90-350

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: February 28, 1991; Released: March 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On June 8, 1990, Telecom*USA and its operating companies (hereinafter "Telecom") filed with the Commission the above-captioned formal complaints against Michigan Bell Telephone Company and Wisconsin Bell Telephone Company (hereinafter the "Defendants") seeking to recover damages for Defendants' alleged overearnings on interstate access services for the period October 1, 1985 through December 31, 1986. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed answers to the complaints.

2. The parties to the above-captioned complaints have conducted discussions aimed at settling matters in controversy. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies between the parties was reached. On February 11, 1991, the parties filed joint motions seeking dismissal of the complaints with prejudice. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motions to Dismiss the above-captioned complaints ARE GRANTED and that the proceedings ARE TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELESYSTEMS AND TELECONCEPTS, INC. File No. I-T-C-90-148 (TC)

Application for authority to assign authority to resell international switched voice service.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 25, 1991; Released: March 7, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by American Telesystems (AT) and TeleConcepts, Inc. (TC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, for AT to assign to TC its authority to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on July 18, 1990. No comments were received.

2. AT is a partnership registered under the laws of the State of Colorado. AT, which operates its business under the name of "EconoComm", is authorized to provide international switched voice services on a resale basis.[1] TC is a Colorado corporation which provides domestic resale services on a non-dominant basis. TC has recently purchased the customer base of AT. As a result of the transaction, TC will become an international common carrier and will be able to extend its communications services to include overseas International Message Telephone Service (IMTS) to Canada, Mexico and other international points as authorized to AT.[2]

3. In light of these circumstances, IT IS CERTIFIED that the present and future public convenience and necessity will be served by the requested assignment of Section 214 authority from AT to TC and the provision of international switched voice services to the general public by TC. However, this authorization is without prejudice to any further action the Commission might take with respect to TC's acquisition of AT's customer base and provision of service without appropriate authorization.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-90-148(TC), IS GRANTED, and:

a. AT is authorized to assign to TC its Section 214 authorization in File No. I-T-C-88-205 to resell international switched voice service; and

b. TC is limited under this authorization to the provision of international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the United States and the points listed in those tariffs.

5. Copies of any operating agreements entered into between TC and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that TC shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that TC shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *American Telesystems*, 3 FCC Rcd 6621 (Com. Car. Bur. 1988)

[2] Although TC states that it will be treated under the Commission's forbearance guidelines, we note that as an international resale common carrier, TC will be subject to streamlined regulation. *See International Competitive Carrier Policies*, 102 FCC 2d 812 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 7, 1991

U S WEST COMMUNICATIONS AND GILA RIVER TELECOMMUNICATIONS, INC. FILE JOINT PETITION FOR WAIVER OF PART 36 RULES RELATING TO ADJUSTMENT OF ARIZONA STUDY AREA BOUNDARIES

(PUBLIC COMMENT INVITED)

On December 7, 1990, U S West Communications (US West) and Gila River Telecommunications, Inc. (Gila River) filed a joint petition for waiver of the definition of "study area" contained in Part 36 of the Commission's Rules. This waiver would allow US West to remove the Sacaton exchange from its Arizona study area and Gila River to establish a new Arizona study area for this exchange.

Parties may file comments on this petition no later than *March 22, 1991*. Replies should be filed by *April 5, 1991*. Comments should reference AAD 91-2. A copy of each pleading should be sent to Gene Gold, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Gene Gold, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

COLUMBIA CELLULAR TELEPHONE COMPANY — File No. 02143-CL-MP-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 95, Columbia, South Carolina, for station KNKA473

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1991; Released: March 7, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Columbia Cellular Telephone Company (Columbia), the non-wireline licensee for the Columbia, South Carolina Metropolitan Statistical Area (MSA), filed the captioned application for modified facilities. The proposed modifications will result in the 39 dBu contours for Columbia's existing Horrell Hill, Lexington and Irmo cell sites extending beyond the MSA boundary and into three neighboring Rural Service Areas (RSAs).[1] Farmers Telephone Cooperative, Inc., Lockhart Telephone Company and West Carolina Rural Telephone Cooperative, Inc. (Petitioners), wireline applicants in the three RSAs, filed a joint petition to deny.[2] Columbia filed a reply. For the reasons stated below, we deny the petition and grant Columbia's application.

II. CONTENTIONS OF THE PARTIES

2. Petitioners argue that, taken together, the proposed extensions are not *de minimis* and not adequately justified. Petitioners estimate that the Horrell Hill extension will cover 70 square miles, or 17.5 percent of the cell area within the MSA; that the Lexington extension will cover 79 square miles, or 16 percent of the cell area within the MSA; and that the Irmo extension will cover 44 square miles, or 10.4 percent of the cell area within the MSA. [3] Petitioners contend that the extensions could be reduced by using a different engineering design. They further argue that the extensions are unfair because they will allow Columbia to secure a large number of potential RSA customers.

3. In reply, Columbia argues that its application proposes several *de minimis* extensions and includes an adequate justification. Columbia states that only 3.96 percent of the Horrell Hill cell will extend into the Clarendon RSA, and that the extension only covers 18.66 square miles, or 0.71 percent of the RSA area and 0.77 percent of the RSA population.[4] Columbia further states that only 12.83 percent of the Lexington cell will extend into the Laurens RSA, and that the extension only covers 71.31 square miles, or 1.98 percent of the RSA area and 0.53 percent of the RSA population. Finally, Columbia states that only 8.74 percent of the Irmo cell will extend into the Cherokee RSA, and that the extension only covers 42 square miles, or 1.93 percent of the RSA area and 0.42 percent of the RSA population. Columbia's application indicated that the extensions were necessary to provide optimum service to highways and population centers within the MSA, and were not intended to serve areas beyond the MSA.[5] Columbia states that, given the nature of the MSA boundaries, it is impossible to serve the MSA without some extension of the 39 dBu contours into adjacent areas.[6]

III. DISCUSSION

4. In *Procedures Update*, 52 Rad. Reg. 2d (P&F) 725 (1982), *aff'd. Cellular Radio Service*, 56 Rad. Reg. 2d (P&F) 1583 (1984), and in Section 22.903(a) of the rules,[7] the Commission established guidelines for configuring 39 dBu contours. The Commission stated that 39 dBu contours should be contained entirely within the MSA or NECMA, but that a *de minimis* extension beyond the CGSA would not render an application defective if the application included "a specific explanation of why it was necessary to engineer the particular cell(s) such that the 39 dBu contours could not be kept entirely within the SMSA (or NECMA)."[8] In analyzing applications which propose contour extensions, we look first to see if the extension is minor, and then to see if there is a specific engineering explanation. In evaluating the explanation, we take a variety of factors into account, such as the terrain and population of the area in question, the shape of adjoining boundaries and any extenuating engineering problems. *See, e.g., Saco River Cellular Telephone Company*, 2 FCC Rcd 2009 (Mob. Serv. Div. 1987); *Metroplex Telephone Company*, 2 FCC Rcd 7301 (Mob. Serv. Div. 1987); *GTE Mobilnet of South Texas Limited Partnership*, 4 FCC Rcd 1657 (Mob. Serv. Div. 1989).

5. Petitioners argue that, taken together, Columbia's proposed extensions are more than *de minimis*. We need not take the subject extensions together in this case, however. *See e.g., Metro Mobile CTS of Charlotte*, 2 FCC Rcd at 3929. The extensions are into three separate RSAs, and the intrusion into each RSA is relatively small, amounting to only 0.71 percent of the Clarendon RSA, 1.98 percent of the Cherokee RSA, and 1.93 percent of the Laurens RSA. The extension of each cell beyond the MSA boundary, even using Petitioners' calculations and estimates,[9] is also relatively minor, amounting to only 17.5 percent for the Horrell Hill cell, 16 percent for the Lexington cell, and 10.4 percent for the Irmo cell.[10] On a population basis, the proposed modifications cover only 0.77 percent, 0.53 percent, and 0.42 percent of the respective RSAs, which we cannot conclude is unfair to Petitioners. Furthermore, Columbia's application explained that the extensions were necessary to serve highways and population centers within the MSA, and were not designed to serve areas beyond the MSA boundary. Finally, we note that the MSA has a very irregular border, and that Columbia's engineering proposal appears to be reasonable. Based on these considerations, we find that the proposed extensions are *de minimis* and permissible.[11]

6. In addition, we find Columbia fully qualified to effectuate its proposal and that granting the instant application to make modifications to cellular station KNKA473 would serve the public interest, convenience and necessity.

IV. ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED that the application (File No. 02143-CL-MP-89) of Columbia Cellular Telephone Company is GRANTED. This authorization does not include the right to any interference protection in any areas outside the Columbia, South Carolina MSA and is conditioned upon coordinating with the current and future co-channel licensees in the areas outside the MSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull back its 39 dBu contours to eliminate any interference due to an extension.

8. IT IS FURTHER ORDERED that the petition to deny filed by Farmers Telephone Cooperative, Inc., Lockhart Telephone Company and West Carolina Rural Telephone Cooperative, Inc. is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The 39 dBu contours for the Horrell Hill, Lexington and Irmo cells would extend into South Carolina 6 - Clarendon (Clarendon RSA), South Carolina 2 - Laurens (Laurens RSA), and South Carolina 3 - Cherokee (Cherokee RSA), respectively.

[2] An application was filed by Farmers Telephone Cooperative for the Clarendon RSA, by West Carolina Rural Telephone Cooperative for the Laurens RSA, and by Lockhart Telephone Company for the Cherokee RSA. The wireline construction permit has since been awarded in each of the above RSAs and each of the Petitioners has an interest in the permittee for its respective market.

[3] Petitioners calculated these percentages by using a ratio of the cell area outside the subject MSA to the cell area inside the subject MSA. In other cases, the Commission has considered a percentage based on a ratio of the cell area outside the subject MSA to the the total area covered by the cell. *See e.g., Rhys G. Mussman*, 3 FCC Rcd 6808 (Com. Car. Bur. 1988); *Houston Cellular Telephone Company*, 5 FCC Rcd 7140 (Mob. Serv. Div. 1990); *Metroplex Telephone Company*, 2 FCC Rcd 7301 (Mob. Serv. Div. 1987). Using Petitioners estimates, the extension area as a percentage of the total cell area would be 14.93 percent for the Horrell Hill cell, 13.81 percent for the Lexington cell, and 9.4 percent for the Irmo cell. Although Petitioners' method of calculation results in somewhat larger percentages, the difference between the two sets of figures here is decisionally insignificant.

[4] Columbia indicates that the total Horrell Hill extension covers 69.1 square miles, and amounts to 14.65 percent of the cell, but that only a portion of this extension intrudes into the Clarendon RSA. Columbia's estimate of the extension of each cell beyond the MSA differs from Petitioner's because Columbia uses a ratio of the cell area outside the MSA to the total area covered by the cell, and because Columbia has a somewhat different estimate of the area covered.

[5] Columbia states that the extensions are necessary in order to provide optimum service to highways US601, US372, US76, US1, ST RT 20, highway 26, and areas around Lake Murray and the town of Irmo.

[6] Columbia also argued that Petitioners, as mere applicants in the RSAs, lacked standing to file a petition. The Commission does not normally grant standing to mere applicants. *See Airsignal International, Inc.*, 56 F.C.C. 2d 819 (Rev. Bd. 1975); *Contel Cellular, Inc.*, 2 FCC Rcd 4773 (Com. Car. Bur. 1987); *Metro Mobile CTS of Charlotte, Inc.*, 2 FCC Rcd 3929 (Mob. Serv. Div. 1987). However, though Petitioners were only applicants when the petition was filed, the wireline permit has since been issued for each of the three RSA markets, and each of the Petitioners has an ownership interest in the permittee for the market in which it filed an application. *See* note 1, *supra*. We will therefore consider the petition and address the issues raised.

[7] Section 22.903(a) states in pertinent part:

> The Cellular Geographic Service Area (CGSA) of the cellular system shall be defined by the applicant as the area intended to be served. No CGSA, which includes areas within a Metropolitan Statistical Area (MSA), or in New England, a New England County Metropolitan Area (NECMA), as modified in paragraph (e), of this section, below, may extend beyond the boundaries of the MSA or NECMA, except where any such extensions are *de minimis* and do not include areas within another central MSA or NECMA.

[8] *Procedures Update*, 52 Rad. Reg. 2d at 726.

[9] *See* notes 3 and 4 *supra*.

[10] *See, e.g, Houston Cellular Telephone Company*, 5 FCC Rcd at 7140 (19.8 percent cell extension is *de minimis); Rhys G. Mussman*, 3 FCC Rcd at 6811 (19 percent cell extension is minimis).

[11] Petitioners also argue that Columbia's application might be defective for failure to include a map showing the proposed modifications. Columbia states that it submitted such a map with its application, and we have the map on file. Accordingly, Petitioners' argument is rejected.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CTLD, Inc. d/b/a Commonwealth Long Distance Company — File No. I-T-C-91-030-TC

Application for Consent to the Transfer of Control of C-TEC Corporation, ultimate parent of CTLD, Inc., to the C-TEC Control Group

MEMORANDUM, OPINION, AND ORDER

Adopted: February 28, 1991; Released: March 7, 1991

By the Chief, International Facilities Division:

1. On November 14, 1990, CTLD, Inc. d/b/a Commonwealth Long Distance Company (Commonwealth) filed an application requesting authority to transfer control of C-TEC Corporation (C-TEC), the ultimate parent of Commonwealth, to a group of C-TEC shareholders (C-TEC Control Group). The application was put on public notice on November 23, 1990, and no comments were received.

2. Commonwealth provides international message telecommunications services (IMTS) between the United States and various international points by reselling the switched voice services of AT&T, MCI and US Sprint.[1] Commonwealth operates under the streamlined regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[2] The application states that Commonwealth is a wholly owned subsidiary of Commonwealth Telephone Company, which, in turn, is wholly owned by C-TEC. C-TEC is a publicly traded Delaware corporation. C-TEC is not a common carrier that is subject to Section 214 of the Communications Act.

3. The C-TEC Control Group is a group of C-TEC shareholders who are entering into an agreement to vote their voting interests in unison. [3] Those voting interests total approximately 56.7 percent. Currently, no single person or entity controls a majority of stock or voting rights in C-TEC. Thus, the application states that *de jure* control of C-TEC will transfer to the C-TEC Control Group when the joint voting agreement takes effect. According to the application, the transfer of control will have no effect upon the management or operation of Commonwealth.

4. C-TEC and the C-TEC Control Group each filed copies of FCC Form 430 showing that they are not directly or indirectly controlled by aliens or a foreign telecommunications entity; nor is any principal shareholder an alien. C-TEC also says that all of its officers and directors are U.S. Citizens.

5. The application states that the proposed transaction will allow for a central, pragmatic approach to the management of C-TEC and its subsidiaries. This will allow C-TEC to pursue vital long-term corporate goals and ensure a stronger, more competitive C-TEC that will continue to provide high-quality communications services through its various subsidiaries.

6. In view of the foregoing, we conclude that the transfer control of C-TEC to the C-TEC Control Group will serve the public interest. It will permit Commonwealth to continue to compete in the international switched voice service marketplace and provide high quality communications services to its customers. We note that after the proposed transfer of control, Commonwealth will continue to be subject to streamlined regulatory requirements for non- dominant international telecommunications carriers.

7. Accordingly, IT IS ORDERED that the application of CTLD, Inc. d/b/a Commonwealth Long Distance Company, File No. I-T-C-91-030-TC, IS GRANTED and we consent to the transfer of control from C-TEC Corporation, the ultimate parent of Commonwealth which holds the Section 214 authorization originally granted in File No. I-T-C-90-125 (*See* n.1), to the C-TEC Control Group.

8. IT IS FURTHER ORDERED that the Commonwealth must continue to maintain tariffs pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

9. IT IS FURTHER ORDERED that Commonwealth must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61 (October 1, 1989).

10. IT IS FURTHER ORDERED that Commonwealth is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in AT&T Communications Tariff F.C.C. Nos. 1 and 2, MCI Tariff F.C.C. No. 1, and US Sprint Tariff F.C.C. Nos. 1 and 2 between the U.S. and those points listed in the aforementioned tariffs in accordance with Commonwealth's previous authorization in File No. I-T-C-90-125 (*See* n.1).

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Commonwealth Long Distance Company, 5 FCC Rcd 5490 (1990).

[2] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies)*.

[3] The C-TEC Control Group consists of Whitman Towers, Inc., Owen & Murray Partners, George B. Sordoni Voting Trust, Charles E. Parente, Andrew J. Sordoni, William B. Sordoni, and Stephen Sordoni. The determination of how to vote the stock will be based on a majority consensus among the latter four.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORP.

Application for authority to discontinue 56 Kbps Full Period Data Service via the INMARSAT system.	File No. I-T-D-91-001
Application for authority to discontinue Private Line Voice Quality Service via the INMARSAT system.	File No. I-T-D-91-002

ORDER AND AUTHORIZATION

Adopted: February 27, 1991; Released: March 7, 1991

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on October 9, 1990 by Communications Satellite Corp. (Comsat), as supplemented by letters dated November 30, December 27, 1990, and January 22, 1991, request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue 56 Kbps Full Period Data Service and Private Line Voice Quality Service between ship earth stations and coast earth stations, via the INMARSAT system, provided under Comsat's Tariff FCC No. 102. The applications were placed on public notice on October 24, 1990. No comments were received.

2. Comsat is currently authorized to provide 56 Kbps Full Period Data Service and Private Line Voice Quality Service between a ship earth station and Comsat's Southbury, Connecticut or Santa Paula, California coast earth station via an INMARSAT satellite.[1] The provision of these services are contingent upon the availability of voice quality channels through the satellite system and these services are subject to preemption by INMARSAT, if satellite facilities are required for on-demand telephone service. INMARSAT is making an effort to meet the growth in demand for its core maritime services. In view of the tight capacity situation, the INMARSAT Council has decided to discontinue its point-to-point, full time telephone lease service for new allotments effective March 1, 1991.[2] Thus, Comsat requests authority to discontinue the services described herein. The services will continue to be provided on an on-demand basis.

3. Upon review of the applications, we find that permanent discontinuance of the subject services will not cause impairment of service to a community or part of a community served by Comsat.

4. Accordingly, IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance of Comsat's 56 Kbps Full Period Data Service or Private Line Voice Quality Service between ship earth stations and coast earth stations via the INMARSAT system, and the substitution of service on an on-demand basis.

5. IT IS ORDERED that applications File Nos. I-T-D-91-001 and I-T-D-91-002 ARE GRANTED, and Comsat is authorized to discontinue its 56 Kbps Full Period Data Service and Private Line Voice Quality Service between ship earth stations and the Southbury, Connecticut and Santa Paula, California earth stations via the INMARSAT system on March 1, 1991.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Memorandum Opinion, Order and Authorization released April 8, 1983, File No. I-P-C-82-010 *et al.*

[2] Comsat initially requested to discontinue the leases effective January 1, 1991. By letter dated January 22, 1991. Comsat advised the Commission that subject service would be discontinued on March 1, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WPOM Radio Partners, Ltd. File No. BR-880930VR

For Renewal of the License of AM Station WPOM, Riviera Beach, Florida

ORDER

Adopted: February 28, 1991; Released: March 7, 1991

By the Chief, Audio Services Division:

1. This proceeding involves the application of WPOM Radio Partners, Ltd. ("the licensee") to renew the license of its AM radio station, WPOM. Kenneth Dawson, a former employee of the station, filed an informal objection to the application and three other former employees filed statements supporting Dawson's objection. *See* 47 C.F.R. § 73.3587. Upon review, we conclude that there are no substantial and material questions of fact requiring resolution in a hearing. *See* 47 C.F.R. § 73.3591(a).

BACKGROUND

2. WPOM is an AM station located in Riviera Beach, Florida. The station experienced a number of technical difficulties during the license term, prompting the licensee to request and receive several special temporary authorizations (STA's) to operate at variance from the technical parameters of its license. Inasmuch as the station is in the process of moving to a new site and is presently operating at variance from its authorized facilities,[1] we shall defer final action on its renewal application pending completion of the move. We shall, however, consider the merits of the informal objection at the present time.

3. Four former employees ("the objectors") object to renewal of WPOM's license based on their observations of station operations between December 1987 and December 1988. The primary objector is Kenneth Dawson, who served as the station's General Manager from December 1987 through April 1988. Lindsay Powell (former Operators Manager), Jimmy Bo Horne (former Community Service Director), and Ron Lovell (former General Manager/Sales Manager) filed statements in support of Dawson's objection.

PLEADINGS/DISCUSSION

4. Pursuant to Section 73.3591(a) of our rules, we grant renewal applications without a hearing if the application meets several basic requirements and if there are no substantial and material questions of fact. *See* 47 C.F.R. § 73.3591(a). The objectors allege that substantial and material questions of fact exist in the present case because: (1) the licensee did not comply with Commission Rules and violated the terms of its license; (2) the licensee is unqualified due to poor character; and (3) the licensee's programming does not meet the needs of the community.

Non-Compliance With Commission Rules and License Terms

5. The objectors allege that the licensee violated Commission rules and the terms of its license by disregarding several engineering requirements,[2] by keeping an incomplete public inspection file and denying the public access to that file, and by failing to maintain the Emergency Broadcast System and related log books in good order. *Cf.* 47 C.F.R. §§ 73.1-73.190, 73.3526, and 73.961. They contend that the owners willfully disregarded these matters and took no action to correct problems brought to their attention.

6. The licensee concedes that it experienced problems in each of these areas. For example, it admits that in late 1987/early 1988 its transmitter was not functioning properly, that there was plant growth around the tower site, and that there were electrical and lighting problems at the towers. It states that it had trouble determining the station's compliance with technical parameters because a consultant took the station's technical records to Connecticut and never returned them. The licensee also verifies that, in 1988, a former General Manager berated a member of the public seeking to examine the public file. The licensee states that it cannot determine whether documents were placed in the file on a timely basis. Finally, it agrees that the Emergency Broadcast System was inoperative for a 24 hour period due to equipment failure. The licensee attributes many of the problems to station employees including several of the objectors whom, according to the licensee, were incompetent, attempted to sabotage the station, and failed to notify the owners that problems existed. The licensee states that when it learned of problems at the station it took corrective action, as evidenced by a Commission inspection of WPOM in December 1988 which uncovered no major violations.

7. The Commission expects each licensee to comply with the rules, and holds the licensee, not the licensee's employees, responsible for any rule violations. *Pacifica Foundation*, 95 FCC 2d 750, 764 (1983); *See Kaye-Smith Enterprises*, 90 FCC 2d 27, 37-38 (1982) and cases cited therein. Thus, a licensee cannot absolve itself from liability by attributing violations to employee misconduct or to inadequate communication between station principals and station management. *Id.*; *See also, Western Communications, Inc.*, 59 FCC 2d 1441, 1450 (1976). When the Commission learns of rule violations by a licensee, the Commission examines the situation on a case-by-case basis to determine a response appropriate to the circumstances. Although a station's violation of engineering rules can result in substantial forfeitures, particularly if the violations were wilful and repeated, such violations do not necessarily raise substantial and material questions related to the licensee's renewal application. *Kaye - Smith Enterprises*, 71 FCC 2d 1402, 1413 (1979), *aff'd* 90 FCC 2d 27 (1982) *citing Pacific Broadcasting Corp.*, 39 FCC 2d 1055 (1973), *forfeiture issued* 44 FCC 2d 1076 (1974). The same is true of violations involving completeness of and access to the public file. *Cf. Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126, 2137 (Rev. Bd. 1987), *aff'd* 4 FCC Rcd 2553, *recon. denied* 4 FCC Rcd 6312 (1989).

8. In the present case, there are allegations and admissions of compliance problems over one year out of the four years in which WPOM Radio Partners, Ltd. held the station's license. [3] There also is evidence that the licensee has acted to correct these problems. For example, WPOM secured the Commission's consent to operate at variance with its license and obtained extensions of its special temporary authorizations. The licensee repaired equipment and remedied tower site problems. It took action to reconstitute the public file and moved it to a safer location under the direct control of a station principal. One of the principals personally ensured that a member of the public was granted access to the public file after an employee denied that access. Furthermore, our December 1988 inspection of the facility indicated general compliance with technical requirements and adequate attention to the contents of the public file.

9. We take note of the licensee's corrective actions but are also concerned with its performance earlier in the license term. The purpose of the public file is to provide the public with timely information at regular intervals throughout the license period. Substantial compliance is not achieved by reconstruction at a later date. *See Pacifica Foundation*, 95 FCC 2d 750, 763 (1983). Similarly, correction of technical problems does not negate their previous existence. We, therefore, wish to emphasize that we do not condone the licensee's failure to comply with our rules. Nevertheless, given the specific violations, the fact that they do not appear wilful, and the licensee's efforts to ensure future compliance, we do not find the matters to be of such significance as to warrant the issuance of a forfeiture or the designation of the license renewal application for hearing. We expect that the licensee will continue to comply with our rules and will exercise adequate supervision and control over station operations.

Character Qualifications

10. The objectors also argue that a hearing is necessary to examine the licensee's character in light of possible FCC and non-FCC misconduct during the license term. *See generally* 47 U.S.C. § 308(b); 47 C.F.R. §§ 1.17 and 1.65(c). Dawson alleges that the rule violations discussed above call the licensee's character qualifications into question. Dawson also states that the licensee may have lied to the Commission on a number of occasions. For example, Dawson alleges that the station's principals requested that he falsely attest, in a document to be filed with the Commission, that ongoing technical problems had been corrected. Dawson alleges that he was terminated when he refused to sign this false certification. In light of this incident, Dawson contends that WPOM's renewal application and its recent request for a construction permit may contain false statements. Furthermore, the objectors allege that WPOM engaged in fraud by basing advertisers' bills on inaccurate air times and by receiving compensation from the ABC network for programming that never aired. Dawson acknowledges that these alleged billing violations have not been adjudicated.

11. The licensee responds that it has been candid with the Commission about technical problems, as evidenced by its requests for special temporary authorization. It states that it never asked Dawson to sign a false statement and denies any irregularities in its billing practices.

12. In examining character issues, the Commission concerns itself with matters that are indicative of the licensee's truthfulness and reliability. *In re Policy Regarding Character Qualifications In Broadcast Licensing*, Gen. Docket No. 81-500, 102 FCC 2d 1179, 1209 (1986), *recon. granted in part and denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987), *modified* 5 FCC Rcd. 3252 (1990) (*Character Policy Statement)*. Acts of wilful misrepresentation to the FCC go to the core concern of truthfulness. Other violations of the Communications Act, Commission rules, or Commission policies can possibly be predictive of future truthfulness or reliability, but are not as proximately relevant. *Id.* at 1209-10. For non-FCC misconduct, the Commission considers only matters that have been adjudicated. *Id.* at 1204-05.

13. The allegations made in the present case do not raise substantial questions of fact regarding the licensee's character. As discussed above, although the licensee violated several rules during the 1987 to 1988 period, it has been forthright with the Commission about these violations and has followed proper Commission procedure in requesting and extending special temporary authorizations to operate at variance from its technical facilities. Accordingly, these rule violations are not indicative of a lack of truthfulness. The allegations that the licensee may have lied to the Commission are too vague and unsupported to be actionable. These allegations are based on Dawson's general beliefs and suppositions rather than on specific facts that can be proven or disproven in a hearing. The claim of fraudulent billing practices is an unadjudicated allegation of non-FCC misconduct and, therefore, would not be relevant to an examination of the licensee's character.[4] *See generally In re: Elimination of Unnecessary Broadcast Regulation*, MM Docket No. 83-842, 59 R.R. 2d 1500 (1986) (deleting rules concerning billing); 47 C.F.R. § 73.658(e) (broadcaster's right to reject network programming). Thus, none of the character issues raised against WPOM's licensee warrant consideration in a hearing.

Programming

14. Jimmy Bo Horne, in his supporting statement, argues that WPOM's programming is not responsive to the needs of the community because of a lack in quality and quantity of public affairs programming. He charges that, during his tenure as Community Service Director, the station's owners instructed that he was "not to air programs that were critical of the station's lack of commitment to the community." He claims that the station's local public affairs program addressed only "the most banal and bland topics imaginable." According to Mr. Horne, WPOM canceled the program and currently does no public affairs programming.

15. The Commission does not require broadcasters to air any specific amount or type of nonentertainment programming. *In re Deregulation of Radio*, 84 FCC 2d 968, 977-83 (1981), *recon. granted in part and denied in part* 87 FCC 2d 797, *aff'd in part and remanded in part sub nom. Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983), *decision on remand* 96 FCC 2d 930 (1984) (*Deregulation of Radio)*. Nor does the Commission, except in instances of obscenity of indecency, interfere with matters of program content. *See* 47 U.S.C. § 326; 18 U.S.C. § 1464. Instead, the Commission has a general requirement that licensees offer programming responsive to the needs of the community it serves. *See Deregulation of Radio*, 84 FCC 2d at 982.

16. Horne's allegations are insufficient to show that WPOM's overall programming is unresponsive to the needs of WPOM's community. According to Horne's own statement, he oversaw WPOM's production of a local public affairs program that was intended to be relevant to the people of Riviera Beach. The choice of topics for such programs is a matter committed to licensee discretion; a station need not air only controversial issues or to undertake an on-the-air self-evaluation of its performance in order to meet community needs. Nor are public affairs programs the only types of programs that can be used to address community needs. The needs of the community can also be met, for example, by programs such as news, public service announcements, editorials, community bulletin boards, and religious programming. *See Deregulation of Radio,* 84 FCC 2d at 982-83. Accordingly, we conclude that there are no substantial and material questions of fact concerning WPOM's overall programming responsibilities to its community of license.

CONCLUSION

17. Of the three issues raised, the objectors only make a *prima facie* showing on one: compliance with FCC engineering and public file rules. The licensee has taken corrective measures and a subsequent Commission inspection of the station verifies operation in accordance with the terms of its special temporary authorization and adequate attention to the contents of the public file. The violations were not significant enough to raise questions of fact warranting further inquiry.

18. Based on the foregoing, we find that the objectors fail to raise a substantial and material question of fact requiring resolution in a hearing. Accordingly IT IS ORDERED that the informal objection of Kenneth Dawson and the supporting statements of Lindsay Powell, Jimmy Bo Horne, and Ron Lovell ARE DISMISSED.

19. We shall defer final action on WPOM's renewal application pending completion of the station's move to a new site. *See* para. 2 *supra.*

20. This action is taken pursuant to delegated authority. *See* 47 C.F.R. §§ 0.61(c) and 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads
Chief, Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Construction permit BP-860930A, granted December 9, 1988, as extended; STA, granted June 20, 1990, as extended.

[2] Specifically, they allege that several monitor points were incorrect, that the resistive component of station's impedance varied, that the tuning units were infested with vegetation, that components of the phasor and tuning units were disconnected, and that the antenna monitor readings were out of tolerance. *See* Letter from Kenneth Dawson to John Theimer, Engineer-in-Charge, FCC Miami Field Office (August 17, 1988) (incorporated by reference in the Informal Objection).

[3] The licensee received the license through an assignment three years into the license term (File No. BAL-850221EO, granted April 2, 1985).

[4] The nature of the misconduct alleged in the present case is not "so egregious as to shock the conscience" and therefore does not fall into the narrow exception to the adjudication requirement. *See Character Policy Statement,* 102 FCC 2d at 1205, n.60; *aff'd* 5 FCC Rcd at 3254, n.5.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-137

In re Applications of

Roy E. Henderson d/b/a PUEBLO RADIO BROADCASTING SERVICE	File No. BPH 861002TA
SANCHEZ COMMUNICATION, INC.	File No. BPH-861002TB
HAL S. WIDSTEN	File No. BPH-861002TE
CLASSIC MEDIA, INC.	File No. BPH-861002TF
BUENA SUERTA BROADCASTING CORPORATION	File No. BPH-861002TG
O-V COMMUNICATIONS	File No. BPH-861002TH

For a Construction Permit
for a New FM Station in
Oro Valley, Arizona

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 1991; Released: March 7, 1991

By the Commission:

1. Before the Commission for consideration is a Commission Memorandum Opinion and Order upholding the dismissal of Classic Media, Inc.'s application because Classic's proposed antenna height violated the 1972 U.S.-Mexican Agreement.[1] *Pueblo Radio Broadcasting Service*, 5 FCC Rcd 6278 (1990).[2] The Commission agreed with the Review Board that the ALJ correctly denied Classic's petition for leave to amend its application to specify a new transmitter site and facilities that complied with the terms of the U.S.- Mexican Agreement and dismissed Classic's application. Classic now seeks reconsideration of the Commission's action.

2. At the outset, we note that Pueblo, in its opposition, argues that Classic's petition must be summarily dismissed as untimely. We agree. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, requires that a petition for reconsideration "must be filed within thirty days from the date upon which public notice is given of the order, decision, report or action complained of." *See also* 47 C.F.R. § 1.106(f). In this case, the Commission's decision denying Classic's application for review was released on October 25, 1990. *See* 5 FCC Rcd at 6278. Under the Commission's rules, public notice of the Commission's decision was given as of the next day, October 26, 1990, and the 30-day period for filing began the day after that, October 27. 47 C.F.R. § 1.4(a),(b). Consequently, the filing deadline for Classic's petition for reconsideration was November 26, 1990, the first business day following the thirtieth day thereafter (November 25, the thirtieth day being a Sunday). [3] *See* 47 C.F.R. 1.4(i). Classic's petition for reconsideration was filed one day late, on November 27, 1990.

3. The Commission, except as noted below, lacks authority to extend or waive the statutory 30-day filing period for petitions for reconsideration set forth in 47 U.S.C. § 405. *See Reuters Limited v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); *Richardson Independent School District*, 5 FCC Rcd 3135, 3136 ¶ 6 (1990); *Metromedia, Inc.* 56 FCC 2d 909, 909-10 ¶ 2 (1975), *recon. denied*, 59 FCC 2d 1189 (1976). Although the Commission may not refuse to consider a late-filed petition for reconsideration if the petitioner shows that its failure to file for reconsideration in a timely matter resulted from "extraordinary circumstances," no such showing has been made here. *See Gardner v. FCC*, 530 F.2d 1086, 1091-92 (D.C. Cir. 1976); *Richardson*, 5 FCC Rcd at 3136 ¶ 7. In its reply, Classic asserts that even if its petition is deemed to be untimely, it is no more than one day late; therefore, the Commission, in its discretion, may consider the merits of the arguments raised. However, the fact that Classic filed its petition only one day out of time does not constitute an "extraordinary circumstance" for which the filing deadline may be extended.[4] *See Richardson*, 5 FCC Rcd at 3136 ¶¶ 6, 8. Classic's petition for reconsideration is in violation of the statutory filing period and therefore must be dismissed.

4. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.106(f), the Petition for Reconsideration filed November 27, 1990 by Classic Media, Inc. IS DISMISSED as untimely.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 1972 Agreement Between the United States of America and the United Mexican States Concerning Frequency Modulation Broadcasting in the 88 to 108 MHz Band, 24 U.S.T. 1815, T.I.A.S. 7697.

[2] Now pending before the Commission are: (1) a Petition for Reconsideration filed November 27, 1990 by Classic Media, Inc.; (2) an Erratum filed November 28, 1990 by Classic; (3) Oppositions to the Petition for Reconsideration filed December 12, 1990 by Pueblo Radio Broadcasting Service (Pueblo) and the Mass Media Bureau; and (5) a Reply to the Oppositions filed December 26, 1990 by Classic.

[3] Classic's assertion in its reply pleading that the first day to be counted was Monday, October 29, 1990 is in error, since the rules state that, when applicable, Saturday is counted as the first day of the thirty day filing period. *See* 47 C.F.R. § 1.4(b), (e)(1).

[4] *Gardner* held that fairness considerations may warrant extension or waiver of the filing period upon a showing that the late filing was due to the Commission's failure to provide the party with notice and the text of the action for which reconsideration is sought, provided that the party acted with diligence in preparing and filing its petition for reconsideration upon receiving actual notice of the action complained of. *See* 530 F.2d 1091-92, n.24; *Richardson*, 5 FCC Rcd at 3136 ¶ 7. The extraordinary circumstances exception is not applicable here, because Classic does not allege or demonstrate that the Commission failed to provide it with notice and the text of the Commission action denying its application for review. *Richardson*, 5 FCC Rcd at 3136 ¶ 8.

Before the
Federal Communications Commission

Washington, D.C. 20554

In the Matter of

PUBLIC SERVICE
COMMISSION OF THE
DISTRICT OF COLUMBIA,
Complainant,

v. File No. E-89-146

THE CHESAPEAKE
AND POTOMAC
TELEPHONE COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1991; Released: March 8, 1991

By the Commission:

1. The Public Service Commission of the District of Columbia (the D.C. PSC) has petitioned for reconsideration of our *Memorandum Opinion and Order* of September 13, 1990 (*MO&O*),[1] which denied its complaint against The Chesapeake and Potomac Telephone Company (C&P) in the above-captioned matter.[2] For reasons discussed below, we are staying the effectiveness of our *MO&O*, reopening the proceeding to receive further evidence, and modifying the *MO&O* to deny C&P's motion to dismiss.

I. BACKGROUND

2. On May 3, 1989, the D.C. PSC filed a complaint alleging that C&P's end-user access charge or subscriber line charge that was in effect between January 1, 1988 and March 31, 1989 for C&P's multi-line business customers was established on the basis of "erroneous" projections and was "excessive" in violation of Section 69.104(c) of the Commission's rules, 47 C.F.R. § 69.104(c),[3] and Section 201 of the Communications Act, 47 U.S.C. 201.[4] The D.C. PSC sought an order directing C&P to give its customers a credit because of the alleged excessive subscriber line charge. C&P denied any violation of the Act and our rules and maintained that the forecasts on which its superseded subscriber line charges had been based were reasonable and accurate when made.

3. On or about May 16, 1989, the D.C. PSC served C&P with an initial set of interrogatories dated May 15, 1989 (May Interrogatories).[5] C&P filed a response to such interrogatories on June 23, 1989. Thereafter, on July 10, 1989 the D.C. PSC filed its motion to compel C&P to answer three of the interrogatories.[6] The parties met with the Common Carrier Bureau's Enforcement Division (Enforcement Division) on July 21, 1989 in an effort to settle or simplify the proceeding.[7] While the Enforcement Division did grant another motion filed by the D.C. PSC on October 6, 1989 to compel C&P to fully respond to certain interrogatories that had been properly filed by the D.C. PSC on July 21, 1989 (July Interrogatories),[8] no formal action specifically addressing the D.C. PSC's earlier motion to compel responses to three of the May Interrogatories was issued.

4 Because the record contained no evidence that C&P had acted either negligently or in bad faith in projecting the number of subscriber lines or the revenue requirement for the base factor portion of the common line category for 1988, we rejected the D.C. PSC's claim that C&P had violated Section 69.104(c) of our rules merely because its multi-line business subscriber line charge had been based on projected revenue requirements or costs that differed from the actual costs subsequently reported.[9] We found that the large number and broad scope of changes in FCC rules that went to the heart of the rate development process created a unique situation and provided an adequate basis for "the dichotomy between C&P's projections and actuals."[10] Given such unique forecasting difficulties and "the fact that the D.C. PSC has not offered other persuasive evidence of the unreasonableness of the multi-line business subscriber line charge...,"[11] we found that the D.C. PSC had "not sustained its burden of showing that the forecasts about which it complains were so unreasonable as to render the rates in violation of Section 69.104(c) of our rules or that the rates were unjust and unreasonable under Section 201 of the Communications Act."[12]

II. PARTIES' CONTENTIONS

5. In seeking reconsideration of the *MO&O*, the D.C. PSC notes that the Commission never acted on its motion to compel responses to Interrogatories 8, 9 and 10 of the May Interrogatories and contends that grant of its motion would have permitted it to determine "the actual reasons for the discrepancy" between C&P's forecast and actuals.[13] If the answers to those interrogatories were not adequate, the D.C. PSC states that it could have filed a motion seeking production of workpapers and depositions of witnesses to determine the assumptions upon which the projections were based and to probe the reasons for "the inaccuracy." [14] The D.C. PSC contends, *inter alia*, that it was deprived of a fair hearing because its complaint was denied on factual issues without action on its pending motion to compel responses to interrogatories directed to "the precise issue involved."[15] Accordingly, the D.C. PSC requests that we either grant the relief sought in its complaint, or grant its motion and reopen the proceeding to receive further evidence.[16]

6. C&P contends, *inter alia*, that the additional discovery sought by the D.C. PSC, even if successful, "would merely lead to a fruitless pursuit of the 'reasons' for forecast variations [from actuals] that the Commission has already determined to be reasonable on their face...assuming such reasons can be isolated...." [17] Further, C&P contends that Interrogatories 8 and 10 are contrary to our discovery rules and that it has already answered Interrogatory 9.[18] In objecting to Interrogatory 8, C&P contends that the identity of the persons providing a particular forecast is irrelevant.[19] C&P also objects to Interrogatory 10 as burdensome and contrary to our policies "which prohibit document requests unless the Commission specifically orders otherwise."[20]

III. DISCUSSION

7. As previously noted, the *MO&O* found that the D.C. PSC had not shown that the forecasts about which it complained were so unreasonable as to render the rates in violation of Section 69.104(c) of our rules or unjust and unreasonable under Section 201 of the Act, "[g]iven the unique forecasting difficulties faced by C&P [as a consequence of the large number and broad scope of changes that we had recently made in our rules] *and the fact that the D.C. PSC has not offered other persuasive evidence of the unreasonableness of the multi-line business subscriber line charge.*[21] However, in so concluding, we inadvertently overlooked the pendency of the D.C. PSC's motion to compel a more specific response to Interrogatory 9.

8. Interrogatory 9 seeks relevant and specific information which could shed light on why C&P's forecast overstated the actual 1988 base factor portion of its common line revenue requirements by fifteen percent. However, C&P's answer that variations in forecasts and actuals "can occur for a variety of reasons" [22] and are "always a matter of opinion"[23] is unresponsive. We believe that C&P should provide the specific information requested in Interrogatory 9 even though directed only at a subset of the costs associated with the common line category. The fact that its overall projected and actual revenue requirements may have been reasonable does not shed light on why an initial forecast was at variance with actual results.

9. As to Interrogatories 8 and 10, we concur in C&P's observation that the taking of depositions and production of documents is not a matter of right under our rules governing formal complaints but a step that we may grant in our discretion if good cause has been shown.[24] The only limitations placed on the subject matter of interrogatories are that they be directed to relevant matter and seek information of a specific nature.[25] However, Interrogatories 8 and 10 seek the identification of persons responsible for the projections in question and their workpapers, respectively, should C&P's response to Interrogatory 9 be unsatisfactory. In light of the foregoing, we conclude that Interrogatories 8 and 10 seek specific relevant information, and are not contrary to our rules as C&P contends. C&P has provided no persuasive support for its claim that Interrogatory 10 is burdensome and contrary to our policies.[26] Thus, C&P also should provide the specific information requested in Interrogatories 8 and 10.

10. Finally, C&P's motion to dismiss the D.C. PSC's complaint in this matter was dismissed as moot by the *MO&O* which denied the complaint. However, since we are staying the effectiveness of the *MO&O*, we now will rule on the merits and deny such motion. C&P's argument that the D.C. PSC's complaint must be dismissed for failure to state a claim because C&P developed its 1988 subscriber line charge in conformity with the methodology specified in Section 69.104(c) of our rules is without merit. It does not follow that, merely because that methodology may have been followed by a carrier, its rate is therefore necessarily just and reasonable under Section 201 of the Act. Further, without regard to whether damages are appropriate (or even sought here), we agree with the D.C. PSC that an appropriate remedy, other than damages, may be directed if we find that C&P violated the Act or our rules.

IV. CONCLUSION

11. In light of the foregoing, we conclude that good cause has been shown to grant D.C. PSC's motion to compel specific responses to Interrogatories 8, 9 and 10 and that the record should be reopened to receive the further evidence called for by those interrogatories and any additional factual evidence directly related thereto that may result from any further discovery proceedings that may be warranted and authorized.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the Motion to Compel Response to Interrogatories, filed by the Public Service Commission of the District of Columbia on July 10, 1989, IS GRANTED.

13. IT IS FURTHER ORDERED that The Chesapeake and Potomac Telephone Company IS DIRECTED TO FILE specific responses to Interrogatories 8, 9 and 10 no later than thirty (30) days from the release of this order.

14. IT IS FURTHER ORDERED that the record in this proceeding IS REOPENED for the purpose of receiving the limited factual information called for by Interrogatories 8, 9 and 10 and any other information that may be authorized and filed as the result of such further discovery.

15. IT IS FURTHER ORDERED that the *Memorandum Opinion and Order*, 5 FCC Rcd 5518 (1990), in this matter IS MODIFIED as set forth herein and its effectiveness IS STAYED pending further order of the Commission.

16. IT IS FURTHER ORDERED that the Motion to Dismiss, filed by C&P on June 8, 1989, IS DENIED.

17. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by the Public Service Commission of the District of Columbia on October 15, 1990 IS GRANTED insofar as consistent with the action taken above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Public Service Comm. of D.C. v. C. & P. Tel. Co., 5 FCC Rcd 5518 (1990).

[2] The pleadings before us for consideration are a Petition for Reconsideration timely filed by the D.C. PSC on October 15, 1990 (Petition); an Opposition timely filed by C&P on October 30, 1990 (Opposition); a Reply timely filed by the D.C. PSC on November 9, 1990 (Reply); a Motion to Compel Response to Interrogatories, filed by the D.C. PSC on July 10, 1989; and an Opposition thereto timely filed by C&P on July 25, 1989.

[3] 47 C.F.R. 69.104 requires carriers providing local exchange or Centrex telephone service to establish a monthly single-line rate or charge for end-users subscribing to such service for each line between the enduser's premises and the carrier's Class 5 office. Section 69.104(c) provides that, subject to certain ceilings prescribed elsewhere in the rules, the single-line rate or charge

shall be computed by dividing one-twelfth of the projected annual revenue requirement for the end-user common line element by the projected average number of local exchange service subscriber lines in use during such annual period. Various other rules in Part 69 prescribe the method for apportioning LEC costs among the various access elements described therein, including the enduser common line element.

[4] 47 U.S.C. 201 provides, in pertinent part, that all charges, practices, classifications, and regulations for and in connection with common carrier interstate or foreign communication by wire or radio shall be just and reasonable.

[5] Although the D.C. PSC furnished copies of its May Interrogatories to the Common Carrier Bureau's Enforcement Division on or about May 17, 1989, it does not appear that the interrogatories were filed in the Office of the Secretary as required by Section 1.4(f) of our rules and therefore properly "filed with the Commission" within the meaning of Section 1.729(d) of our rules. Nevertheless, we have considered them in our action herein.

[6] The interrogatories asked C&P to explain the reasons for differences between the projected and actual number of access lines and the projected and actual revenue requirements (Interrogatory 9), and to identify the persons responsible for the projections (Interrogatory 8) and their workpapers (Interrogatory 10). With respect to Interrogatories 8 and 10, the D.C. PSC requested the information "so that [it] may move that the FCC order further discovery by means of production of documents or depositions, should that be necessary." Motion at 3.

[7] *See generally* letter from Howard M. Wilchins to Peter G. Wolfe (August 4, 1989) (specifying dates for filing briefs); *see also* Order, 4 FCC Rcd 6705 (Enf. Div., Com. Car. Bur. 1989) (authorizing a limited deferral of discovery so that parties could focus on briefing legal issues).

[8] Order (Enf. Div., Com. Car. Bur., released Nov. 13, 1989).

[9] *MO&O*, 5 FCC Rcd at 5519.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Petition at 4.

[14] *Id.* at 5.

[15] Reply at 1-2.

[16] Petition at 6.

[17] Opposition at 5.

[18] *Id.* at 4, n.10.

[19] Response to Complainant's First Set of Interrogatories, filed by C&P on June 23, 1989, at 4.

[20] *Id.* at 5-6.

[21] *MO&O*, 5 FCC Rcd 5519 (emphasis added).

[22] Response to Complainant's First Set of Interrogatories at 5. C&P also noted that the interrogatories at issue examined only a subset of the costs associated with the common line element; that the actuals for the common line category as a whole exceeded its forecast; and that actual end-user revenues were lower than C&P's forecast revenue requirement. Relying on AT&T v. FCC, 836 F.2d 1386 (D.C. Cir. 1988), C&P contends that it would be inappropriate to examine subcategory forecasting "peaks" without considering forecasting "valleys".

[23] Opposition to Motion to Compel Response to Interrogatories at 4-5.

[24] 47 C.F.R. § 1.730(a). *See* Amendment of Rules Governing Procedures To Be Followed Where Formal Complaints Are Filed Against Common Carriers, 3 FCC Rcd 1806, 1811 (1988) (hereinafter "Complaint Rules Order"). We cannot agree with C&P's contention that, in the absence of an order authorizing such extended discovery, Interrogatories 8 and 10 must be denied as irrelevant and burdensome. Citing the Complaint Rules Order at paras. 30, 36, C&P asserts in this connection that the Commission rejected a proposal to amend its rules to allow for the identification of individuals with knowledge of information relevant to the dispute and, thereafter, the production of relevant documents. However, what the Commission rejected was a proposal to expand the scope of *self-executing* discovery beyond interrogatories to include requests for production of documents. *Id.* at 1810.

[25] Complaint Rules Order, 3 FCC Rcd at 1810.

[26] Section 1.730 of the rules establishes "the right to request additional forms of discovery upon a showing of good cause, which permits the development of a fuller record where appropriate." Complaint Rules Order, 3 FCC Rcd at 1810.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Liability of WROV Broadcasters,
Inc., Licensee of Station
WROV(AM), Roanoke, VA
for Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: February 25, 1991; Released: March 8, 1991

BY THE COMMISSION:

1. The Commission has before it a "Petition for Remission or Mitigation of Forfeiture" filed by WROV Broadcasters, Inc., former licensee of WROV(AM), Roanoke, Virginia.[1] The NAL was issued on June 9, 1989, in the amount of $5000 for repeated failures to comply with the Commission's affirmative action rule. 47 C.F.R. Section 73.2080.[2]

2. The NAL set out a record of inadequate EEO efforts. Review of the former licensee's renewal application and response to our inquiry revealed that it failed to recruit, hire, and promote women and minorities during the license term. Specifically, we found that WROV used sources likely to attract female and minority applicants for seven of 65 overall vacancies and two of 42 upper-level vacancies from June 1981 through June 1988. We also noted that of those 65 full-time hiring opportunities, WROV indicated that it hired 37 women and 10 Blacks. For the year prior to filing for renewal, WROV's affirmative recruitment efforts were limited to contacting a minority referral source for one clerical position, which resulted in the hiring of a Black female. Of 11 hiring opportunities during that year, WROV received 65 female referrals and 14 minority referrals. Six of the 11 hires were women and one was a minority who was not employed long enough to be listed on the station's Annual Employment Report.

3. In addition, we concluded that the former licensee did not engage in self-assessment of its EEO efforts as required by Section 73.2080 (c)(3) of the Commission's Rules, 47 C.F.R. Section 73.2080 (c)(3). Although the available labor force for the Roanoke, Virginia Metropolitan Statistical Area (MSA) is 9.9% Black, WROV's Annual Employment Reports (FCC Form 395-B) filed during the license term list no Blacks in upper-level positions and two Blacks overall, one in 1984 and one in 1985. It thus appeared that most of the Blacks hired during the license term did not remain with the station long enough to be included on the station's Annual Employment Reports. Moreover, it appeared that the licensee did not make efforts to employ women in upper-level positions.

4. WROV Broadcasters responded to the NAL and requested a reduction in forfeiture from $5000 to $1000 because the "overall performance of WROV AM radio during the 34 years of our ownership and operation justifies a reduction." [3] The former licensee argues that the Commission should consider its "stellar record of EEO accomplishments" such as employing the first Black newsperson, the first Black sales executive, the first female sales executive, and the first female on-air personality in the Roanoke market. In addition, WROV Broadcasters submits that it trained and hired Black recruits via a program designed to move welfare mothers into the paid work force. The former licensee further notes that it has followed a flextime program suited to working mothers, permitted job sharing, hired temporaries when permanent employees needed extended time at home, granted leaves of absence to mothers during summer vacation and other school holidays, and allowed mothers to keep their children with them at the office.

5. WROV Broadcasters also asserts that its hiring record was above parity for the Roanoke MSA throughout the license term, since 57% of the hirees during the license term were female and 15.4% of them were Black. The former licensee further notes that it is a 1000-watt AM station in a small market and thus has difficulty recruiting minorities. WROV submits that it has recruited, hired, and trained minority employees but that they were hired away by larger stations at higher salaries. In addition, the former licensee argues that the NAL did not cite specific instances of its failure to comply with the self-assessment requirements of the EEO rules. It submits that "the record before the Commission when it issued the [NAL] showed WROV's tailoring of its employment practices to be a model for other stations to use in their efforts to attract females and minorities."

6. The former licensee further contends that the NAL mischaracterized its EEO record. First, WROV submits that it regularly used more than 20 minority and female recruitment sources. It asserts that while not every source was used for every position, at least five minority and female sources were used for each position. WROV lists several sources indicated on its 1988 EEO Program Report (FCC Form 396) and cites its President's involvement with Black-oriented community organizations, many of which it used as recruitment sources. The former licensee also notes that it maintained an internship program with local schools. Second, WROV claims that it contacted the Professional Women's Association for jobs involving managerial skills such as traffic director, copy director, and office manager, not just for clerical positions as stated in the NAL. Third, WROV objects to the implication in the NAL that Blacks were hired only for clerical positions when they were also hired for upper-level on-air jobs.

7. Finally, the former licensee argues that the NAL was statutorily deficient. It submits that Section 503 (b)(4) of the Communications Act, 47 U.S.C. Section 503 (b)(4), provides that any notice of apparent liability must state the date on which the challenged act or ommission occurred. The former licensee notes that Section 503 (b)(6)(A) of the Communications Act, 47 U.S.C. Section 503 (b)(6)(A), provides that no forfeiture may be levied for actions more than three years prior to the date of the notice. Moreover, the licensee argues that pursuant to Section 503 (b)(6)(B) of the Communications Act, 47 U.S.C. Section 503 (b)(6)(B), because it is not now the licensee of any broadcast station, it cannot be held liable for any forfeiture based on events which occurred more

than one year prior to May 23, 1989, the date the NAL was adopted. Accordingly, WROV Broadcasters requests that the forfeiture be remitted or reduced.

8. Once a Notice of Apparent Liability for Forfeiture has been issued, the respondent is "afforded a reasonable period of time (usually 30 days from the date of the notice)" in which to show in writing why a forfeiture penalty should not be imposed, why it should be reduced or, in the alternative, to pay the forfeiture. Any showing by the respondent to support its request must include a detailed factual statement and such documentation and affidavits as may be pertinent. 47 C.F.R. Section 1.80 (f)(3). Section 1.80 (b)(3) of the Commission's Rules, 47 C.F.R. Section 1.80 (b)(3), lists the factors considered by the Commission in determining the amount of a forfeiture penalty. These include the nature, circumstances, extent, and gravity of the violations, as well as the degree of culpability, prior offenses, and ability to pay of the violator, and such other matters as justice may require.

9. The former licensee's response to the NAL does not provide a basis for reducing the forfeiture. Although WROV Broadcasters now argues that its overall performance during its 34-year tenure as licensee justifies reduction of the forfeiture, our review of its EEO record indicates otherwise. In 1975, WROV's license was renewed subject to reporting conditions for failure to comply with our EEO rules. Seeing no improvement, the Commission again sanctioned the station by granting renewal for less than a full term and imposing reporting conditions in 1978--the very next license term. From the end of that short-term renewal (August 1, 1980) to the beginning of the license term now under review (October 1, 1981) no sanctions were imposed. However, the current review of your EEO performance commencing with the 1981 license term reflected a lack of EEO compliance.

10. Despite prior sanctions, it appears that the former licensee did not engage in self-assessment of its EEO efforts. Had it done so, it would have discovered that its recruitment sources were, for the most part, ineffective. Further, while the former licensee listed several recruitment sources in a November 11, 1988, response to a staff inquiry, only three of those sources appear to be oriented toward women and minorities -- the NAB Clearing House, the Professional Women's Association, and the Total Action Against Poverty Program. The extent to which WROV obtained female and minority referrals from these sources prior to the 1988 reporting year is unknown. The former licensee noted that much of its documentation regarding referrals received from all sources was destroyed in a 1985 flood. WROV also indicated that it contacted the Professional Women's Association for secretary/receptionists, a research assistant, and a traffic assistant, all clerical positions. On reconsideration, however, WROV Broadcasters has failed to provide specific evidence to support its new claim that it contacted female and minority-oriented recruitment sources for all 65 vacancies which arose during the license term.[4]

11. The station's Annual Employment Reports indicate that WROV employed no Blacks throughout most of the license term. On March 9, 1989, WROV Broadcasters provided a list of the Blacks it hired since 1978. The list includes 19 persons, 14 of them hired during the license term. Seven of those 14 were hired for full-time positions; all seven were Black women hired for clerical jobs. As the former licensee observes, the NAL mistakenly stated that Blacks were hired during the license term for only six clerical jobs. The record does not reflect, however, that Blacks were hired for full-time upper-level jobs during the license term. In fact, six of the seven Black women were hired for the same secretary/receptionist opening and the seventh was hired as assistant traffic director, a lower-level position. Most of the seven hirees left the station shortly after they were hired.[5] In addition, while the former licensee argues that its minority employees are quickly hired away by other stations, only three of the 19 full-time and part-time Blacks hired since 1978 moved on to another station. None of the seven full-time Blacks hired during the license term did so. Moreover, WROV's small size and low wattage should affect minorities and non-minorities equally.

12. Finally, the former licensee mischaracterizes Section 503 of the Communications Act, 47 U.S.C. Section 503. Section 503 (b)(6)(A)(ii) provides as follows:

> No forfeiture penalty shall be determined or imposed . . . if . . . the violation charged occurred . . . prior to the date of commencement of the current term of . . . license . . . so long as such violation occurred within 3 years prior to the date of issuance of [the NAL].

The actions of WROV Broadcasters constitute a continuing violation of the Commission's Rules, each day of which is considered a separate offense. 47 U.S.C. Section 503 (b)(2). We held in the NAL that the licensee violated our EEO Rule during the entire license term, which includes the three-year period referenced by the former licensee. Specifically, the violations included the period of June 9, 1986 through June 9, 1988, which was within the three-year period prior to issuance of the NAL on June 9, 1989. For example, as we mentioned in the NAL,

> . . . for the 11 job vacancies filled from June 1, 1987, to June 1, 1988, affirmative recruitment efforts toward minorities were limited to contacting a minority referral source for a clerical position which resulted in the hiring of a black female. In addition, you acknowledged that "there is no question that the record indicates serious flaws in the recruitment program when examining the females and Blacks hired for each position."

WROV Broadcasters, Inc., 4 FCC Rcd 6157 (1989).

Moreover, since the violations occurred throughout the period (i.e. on every day) we believe that the NAL complied with the requirement that the date(s) of the conduct be provided.

13. WROV Broadcasters also asserts that "since WROV is not now the licensee of any Commission broadcast station, it would appear that [Section 503 (b)(6)(B)] applies, and that WROV cannot be liable for any forfeiture based on actions or omissions occurring prior to May 23, 1988." Section 503(b)(6)(B) of the Act states as follows:

> No forfeiture penalty shall be determined or imposed . . . if . . . such person does not hold a broadcast station license issued under title III of this Act and if the violation charged occurred more than 1 year prior to the date of issuance of the [NAL].

Because WROV Broadcasters was the licensee of WROV when the NAL was issued, Section 503 (b)(6)(B) does not apply.[6]

14. Accordingly, *IT IS ORDERED* that the Petition for Remission of Mitigation of Forfeiture filed by WROV Broadcasters, Inc. *IS DENIED*.

15. *IT IS FURTHER ORDERED*, pursuant to Section 503(b) of the Communications Act of 1934, as amended, that WROV Broadcasters, Inc. *FORFEIT* to the United States the sum of five thousand dollars ($5,000) for the willful and continued violation of Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules and Section 504(a) of the Communications Act of 1934, as amended, as summarized in the attachment to this Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] An application assigning station WROV to Lisa Broadcasting, Inc. was granted on May 25, 1989, and consummated on May 31, 1989, conditioned on the Commission's granting renewal of the station's license.

[2] Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ, and promote qualified women and minorities.

[3] On July 5, 1989, the President of WROV Broadcasters filed an objection to the NAL *pro se*. On July 11, 1989, counsel for WROV filed a "Petition for Remission or Mitigation of Forfeiture," which it stated was a supplement to the earlier pleading. Both submissions will be treated as a single petition.

[4] As stated in the NAL, the former licensee, in response to our inquiry, indicated that it filled 65 vacancies during the license term and named the recruitment sources it used to fill those vacancies. WROV noted that it contacted either the NAB Clearing House, the Total Action Against Poverty Program, or the Professional Women's Association for seven of the 65 vacancies. WROV indicated sources of general recruitment for the other 58 vacancies. Although the former licensee provided a separate list of female and minority-oriented recruitment sources which included the above three organizations, it cannot document contact with those sources for any of the 65 vacancies which arose during the license term.

[5] Two secretary/receptionists remained at the station for two weeks, one for one month, one for three months, and one for approximately one year. At the time the licensee filed its response to our inquiry, the Black female holding the secretary/receptionist position had been with the station for eight months. The assistant traffic director was with the station for an unspecified amount of time which appears to have been brief from the circumstances described.

We note here your assertion that a secretary/receptionist who had left the station in 1983 after three months expressed an interest in returning to the station about a year after her departure. You state that you could not re-hire her because you "had just hired Carole Beane." Your records indicate, however, that Ms. Beane was hired in 1978 and left the station in 1981.

[6] The Commission adopted the NAL on May 23, 1989. Pursuant to the licensee's request for expedited treatment, we granted the assignment on May 25 on the condition "[t]hat the assignment of license . . . not be consummated until the pending license renewal application . . . is granted." The Commission's Order granting the renewal application was released on June 9, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-22

In the Matter of

Amendment of Section 43.61 of
the Commission's Rules

NOTICE OF PROPOSED RULE MAKING

Adopted: February 4, 1991; Released: March 8, 1991

By the Commission:

I. INTRODUCTION

1. All common carriers that provide international communications service must file an annual report of service provided in the previous year. *See* 47 CFR §43.61 (October 1, 1989). The reports contain traffic and revenue information for service between the United States and overseas points. This Notice proposes to: (1) rewrite Section 43.61 of the Commission's Rules in generic terms; (2) provide for a filing manual with reporting instructions; (3) include service with Canada, Mexico, and St. Pierre-Miquelon; (4) eliminate obsolete requirements; and (5) streamline requirements for resellers.[1]

II. DISCUSSION

A. Revision of Section 43.61

2. Section 43.61 requires common carriers that provide international communications service to file annual reports on service between the United States and overseas points and prescribes the requirements for reporting the traffic and revenue information. The data in the reports have several uses. For example, the Commission publishes an annual report showing service between the United States and overseas points for switched services, market share statistics, private line data, and information on resellers' international service.[2] The data are used by the staff to conduct studies in international communications, to track developments in the industry and growth in demand, to evaluate facility planning options, and to assess applications for facilities. The data also help the staff identify emerging issues and analyze factors that have an impact on them.[3]

3. We propose to streamline and simplify Section 43.61 in two steps. First, we propose generic reporting requirements to replace the detailed requirements, data categories, definitions, and schedules in the current section of the Rules. Second, we propose to direct the Chief of the Common Carrier Bureau to issue a filing manual containing the reporting requirements and other instructions to be used by common carriers to compile their reports. [4] The manual will describe the detailed reporting requirements, clarify definitions to ensure that carriers report comparable data, and ensure that data are transmitted efficiently using computer medium. We tentatively conclude that putting the detailed reporting requirements in a manual rather than our rules will make it easier to modify them in response to changing conditions. We invite interested parties to comment on this proposal to revise Section 43.61.

B. Scope of Section 43.61

4. Service with Canada, St. Pierre-Miquelon, and Mexico is not now reported with other international traffic. Our study of international settlements makes it clear that we need to collect data on service between the United States and all international points, including Canada and Mexico, since they are the two largest IMTS markets of the United States, accounting for one-fifth of AT&T's IMTS revenue in 1987.[5] We considered modifying Section 43.61 in 1984 to include service with these points[6] but did not make the change because intra-North American points were integrated with the U.S. domestic network.[7] Changes have occurred in the industry since then and new issues have emerged. International settlement payments of U.S. common carriers have increased substantially in recent years, exceeding $2 billion in 1988, and they are growing by more than 20 percent per year. Telephone service with Mexico accounts for a disproportionate share of the deficit while the situation with Canada vacillates between surpluses and deficits. In our analysis of the deficit, we concluded that its size and rapid growth require our continued attention.

5. We propose, therefore, to modify Section 43.61 and require carriers to submit data for service with Canada, Mexico, and St. Pierre-Miquelon in their international traffic reports. We invite interested parties to comment on this proposal.

C. Elimination of Obsolete Requirements

6. The current Section 43.61 requires two schedules each for message telegraph service, message telephone service, and telex service. One schedule, the message traffic (MT) schedule, reports service for each overseas point of destination and origin, including service that transits the United States. The other schedule, the circuit traffic (CT) schedule, reports service to countries with which U.S. carriers have direct service. Traffic is divided between service that originates or terminates in a foreign country, i.e. direct service, and service that transits a foreign country, i.e. indirect service.

7. Data in the MT schedules are used for a number of reports and studies whereas the data in the CT schedules are not used by the staff or the public. We do not believe the CT schedule is needed so we propose to eliminate it. We invite interested parties to comment on this proposal.

8. The current Section 43.61 also requires carriers to submit detailed information on "facsimile, cablephoto, and radiophoto service;" "photo transmission service;" and "addressed press service." *See* 47 CFR §43.61(a)(2); (5); (13) (October 1, 1989).These services are no longer widely used. We propose to eliminate the requirement that carriers report detailed information on them. If they are provided in the future, carriers will be required to file aggregate traffic and revenue statistics rather than the detailed data currently required. Data will be reported separately for each service in the miscellaneous service reporting category. We invite interested parties to comment on the proposal.[8]

9. The current Section 43.61 also requires common carriers providing international leased channel or private line service to submit data on the number of leases by user category and transmission speed, divided between "full period" and "short period" service. The user categories are: United States Government agencies, foreign governments, press entities, and other users. *See* 47 CFR §43.61(f)(9) (October 1, 1989).

10. We propose to eliminate the requirement that international common carriers provide data on leased channel and private line service by user category because this kind of detailed information is no longer needed to monitor developments in the industry or to fulfill other regulatory objectives. We also propose to eliminate the requirement that international common carriers provide data on leased channel and private line service divided between "full period" and "short period" service. The distinction no longer serves a useful purpose. Instead, carriers will be required to report data in transmission speed categories, which we propose to augment by adding two categories, "voice only" service and "over 120 megabits/72 megahertz", to the existing four categories. *See* 47 CFR §43.61(f)(9)(b) (October 1, 1989). We also take this opportunity to note that the revenue figures reported for private line and leased channel service should include only the revenue derived from the international portion of the communications circuits used to provide service. We invite interested parties to comment on these proposed modifications.

11. The current Section 43.61 generally requires international carriers to report separately total revenue for telegraph service, message telephone service, telex service, leased channel service, other telegraph service, and other telephone service. We believe accurate revenue figures for the individual services can be derived from other information included in the reports. We see no need to require a separate schedule that reports total revenue collected from users. We propose, therefore, to eliminate this requirement and invite comments by interested parties.

12. The current Section 43.61 also requires carriers to file data on service classifications. The service classifications for telegraph service are "full rate, letter, and press." *See* 47 CFR §43.61(f)(1)(iii) (October 1, 1989). For telephone service, they are "day rate, person, etc." *See* 47 CFR §43.61(f)(2)(iii) (October 1, 1989). We propose to eliminate these requirements because, in the case of telegraph service, demand has declined steadily for many years and the data reported in the MT schedules are sufficient to track developments for this service. The telephone service classifications have highly aggregated data and some are outdated while others have little meaning for much of the service terminating in the United States. Moreover, the detailed data reported in the MT schedules are sufficient to monitor this segment of the industry. We invite interested parties to comment on this proposal.

D. Modification of Reporting Requirements for Resale Carriers.

13. Several resellers have petitioned the Commission requesting either a waiver of Section 43.61 or a reduction in the detailed reporting requirements. Frequently, they cite the cost burden imposed on them to collect, compile, and report detailed traffic and revenue data. Many state that their international service is reported by facility based carriers and combining service reports results in double counting. The Common Carrier Bureau, acting under delegated authority, routinely grants partial waivers to international resellers which allow them to file summary data rather than detailed traffic and revenue statistics. A list of the countries they serve is also required.

14. Because we believe that we can reduce resellers' reporting requirements without compromising our ability to collect accurate information, we propose to require international carriers acting exclusively as resellers to report total figures in lieu of the detailed information currently required. Such resellers would report total messages, minutes, revenue, and payouts to foreign correspondents. Revenue should measure billings collected from customers for international service. Detailed reporting requirements would apply to resellers that acquire or lease international facilities. We invite interested parties to comment on this proposal.

E. Reporting New International Services

15. New international communications services are becoming available as customers' needs change. We want to ensure that these services are included in the annual reports but we do not intend to create detailed requirements for them at this time. We propose to require common carriers to identify their new services and to report the total revenue for each service in the miscellaneous service category. We invite interested parties to discuss the services that should be reported in this manner and to comment on the proposal.

F. Clarification of Reporting Units

16. International common carriers have two sets of traffic and revenue data for international switched service, one based on customer billing information and the other on settlements with foreign correspondents. It is our understanding that there are differences between the two sets of data, but we believe most carriers' reports are based on customer billed data for service originating in the United States rather than settlement data. The reports filed by AT&T, for example, have always used customer billed data for originating service. We believe this reflects the intent of Section 43.61. To avoid the possibility of compiling data that use different sets of minutes submitted by U.S. common carriers and publishing it in our reports and annual statistical publication, we propose to require all common carriers to use customer billed information for service originating in the United States when they compile their 43.61 reports. We invite parties to comment on this proposal.

17. The data submitted by U.S. common carriers for service terminating in the United States are based on international settlements information received from foreign correspondents. It is the only data available to U.S. common carriers on terminating service. We expect carriers to continue to use it for their reports even though it may produce minor differences between the data for originating service and terminating service.

III. CONCLUSION

18. The Commission believes that the updating and simplification of the record keeping and reporting requirement proposed here would further the goals of the Paperwork Reduction Act of 1980.[9] Under this Act, an agency is required to review its Rules and Regulations and

to determine whether they are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility. Pursuant to such review, the Commission, as mentioned above, believes that the record keeping and reporting requirements discussed in this Notice of Proposed Rule Making can be significantly reduced.

19. In compliance with the provisions of Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §605(b), we certify that the updating and simplification of the annual report of international telecommunications carriers (Section 43.61) will not have a significant economic impact and will ease the record keeping and reporting requirements of large and small carriers. The rationale for the proposed updating and simplification is outlined in the above discussions.

20. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 CFR § 1.1206(a) (October 1, 1989). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 CFR §1.1202(f) (October 1, 1989). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 CFR § 1.1203 (October 1, 1989).

21. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1), if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 CFR §1.1202(b) (October 1, 1989). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

22. Any person who in making an oral *ex parte* presentation that presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 CFR §1.1206 (October 1, 1989).

IV. ORDERING CLAUSES

23. ACCORDINGLY, IT IS ORDERED, that pursuant to the provisions of Section 4(i) and 219, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 219, 220 and 403 there is HEREBY INSTITUTED a notice of proposed Rule Making into the foregoing matter.

24. IT IS FURTHER ORDERED, That pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **April 29, 1991** and reply comments on or before **May 14, 1991**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended, 47 U.S.C 154, 303, implement 5 U.S.C. 552 unless otherwise noted.

Section 1.790 is revised to read as follows:

§ 1.790 Reports relating to traffic by international carriers.

Carriers shall file periodic reports regarding international point-to-point traffic as required by Part 43 of this chapter.

Part 43 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

2. The authority citation for Part 43 continues to read as follows:

AUTHORITY: Secs. 4, 48 Stat. 1066, as amended, 47 U.S.C. 154 unless otherwise noted. Interpret or apply Secs. 211, 219, 48 Stat. 1073, 1077, as amended; 47 U.S.C. 211, 219, 220.

Part 43.61 and its heading are revised to read as follows:

§ 43.61 Reports of international telecommunications traffic.

(a) Each common carrier engaged in providing international telecommunications service between the area comprising the continental United States, Alaska, Hawaii, and off-shore U.S. points and any country or point outside that area shall file a report with the Commission not later than July 31 of each year for service provided in the preceding calendar year.

(b) The information contained in the reports shall include traffic and revenue data for each and every service provided by a common carrier, divided among service originating in the United States, service terminating in the United States, and service transiting the United States.

(c) Each common carrier shall submit a revised report by October 31 identifying and correcting any inaccuracies included in the annual report exceeding five percent of the reported figure.

(d) The information required under this section shall be furnished in conformance with instructions and reporting requirements prepared by the Chief, Common Carrier Bureau.

FOOTNOTES

[1] In a related matter, we also propose to delete the reference to marine telegraph requirements in Section 1.790. We eliminated the requirement for reports on marine telegraph service in 1988. *See* Report and Order, 3 FCC Rec 588 (1988).

[2] For the latest report, *See* "International Communications Traffic Data Report for 1988," Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, released October 11, 1989. Summary tables for telephone service, telex service, and telegraph service are published in *Statistics of Communications Common Carriers*.

[3] The data were used extensively to study accounting rates and settlements in international communications services. *See* "International Accounting Rates and the Balance of Payments in International Telecommunications Services, Report of the Common Carrier Bureau to the Federal Communications Commission, December 12, 1988, and *See also* "The Balance of Payments Deficit in International Telecommunications Services," by Kenneth B. Stanley, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, December 12, 1988.

[4] The manual will replace the one currently used. *See* "Filing Manual for Section 43.61 of the Commission's Rules and Regulations," April 13, 1987.

[5] *See* "International Accounting Rates," Table 6, p.10.

[6] *See* Further Notice of Proposed Rule Making, CC Docket No. 79-262, FCC 84-393 (released August 14, 1984), 49 Fed. Reg. 35809 (September 12, 1984). Service with these locations has not always been excluded from the reports. At one time, carriers were required to file the data. *See* Order No. 71, FCC, June 5, 1940. A subsequent ruling reversed this decision. *See* Order No. 85, FCC, August 19, 1941.

[7] *See* Amendment of Section 43.61, Traffic data reporting requirements, 100 FCC 2d 578 (1985); (hereinafter *1985 R&O)*.

[8] The facsimile, cablephoto, and radiophoto service identified in Section 43.61 was offered by international telegraph carriers when the predecessor of Section 43.61, Order 85, was issued in 1941. Such service should not be confused with modern facsimile service that is transmitted using telephone lines and pursuant to rates contained in current tariff filings. Modern facsimile service is growing rapidly and we will continue to require carriers to report information on it in their Section 43.61 submissions.

[9] 44 U.S.C. 3501 *et seq*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-576

In the Matter of

Amendment of Section 73.202(b), RM-7393
Table of Allotments,
FM Broadcast Stations.
(Garrison, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 22, 1991; Released: March 8, 1991

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of James P. Gray ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 7071 (1990), proposing the allotment of Channel 252A to Garrison, Kentucky, as that community's first local broadcast service. Petitioner filed comments. No other comments were received.

2. The *Notice* requested that petitioner provide information to demonstrate that Garrison is a community for allotment purposes, since it is not listed in the 1980 U.S. Census. In response, petitioner states that Garrison is listed in the 1988 *Rand McNally Commercial Atlas* with a population of 650 people. Garrison is the third largest community in Lewis County, which has a population of 14,545 persons. He claims that a "significant amount of growth" in the community has begun. Petitioner states that Garrison has its own fire department, post office, public school, Head Start Program, and churches. Petitioner submits a list of the businesses located in the community of Garrison, along with copies of the Vanceburg/Garrison telephone book, a Kentucky Business Directory showing businesses listed in Garrison, and a topographic map of Garrison.

3. We believe that petitioner has provided sufficient information to warrant the allotment of Channel 252A to Garrison as a first local FM service. Garrison is an identifiable population grouping with businesses and community organizations which identify themselves with Garrison. *See Laughlin, Nevada*, 2 FCC Rcd 6267 (1987).

4. Channel 252A can be allotted to Garrison in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3.0 miles) east of the community.[1] The site restriction is necessary in order to avoid a short-spacing to Station WKQQ(FM), Channel 251C1, Lexington, Kentucky.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Garrison, Kentucky	252A

6. The window period for filing applications will open on **April 23, 1991,** and close on **May 23, 1991.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 252A at Garrison are North Latitude 38-37-00 and West Longitude 83-07-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-465

In the Matter of

Amendment of Section 73.202(b), RM-7278
Table of Allotments,
FM Broadcast Stations.
(Chippewa Falls, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 22, 1991; Released: March 8, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6255 (1990), proposing the allotment of Channel 260C3 to Chippewa Falls, Wisconsin, as that community's second FM broadcast service. The *Notice* was issued in response to a petition filed by Jay Lellman ("petitioner"). Petitioner filed initial comments of continuing interest in the allotment. After the period for filing comments closed, petitioner filed a request for withdrawal of its petition.[1] In addition, Chetek Broadcasters filed an untimely counterproposal requesting the allotment of Channel 260C2 to Chetek, Wisconsin.[2]

2. As stated in the appendix to the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making a new allotment to a community absent an expression of interest. Therefore, since there has been no such interest here, we will dismiss the petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of Jay Lellman, requesting the allotment of Channel 260C3 to Chippewa Falls, Wisconsin, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In accordance with Section 1.420(j) of the Commission's Rules, petitioner submitted a statement that it has not received or been promised any consideration for the withdrawal of the petition for rule making.

[2] The counterproposal filed by Chetek Broadcasters has not been accepted. Section 1.420(d) of the Commission's Rules states that counterproposals shall be advanced in initial comments only and will not be considered if they are advanced in reply comments. Chetek Broadcasters filed a proposal on January 14, 1991, requesting the allotment of FM Channel 294C2 to Chetek, Wisconsin. That proposal has been accepted as a new petition (RM-7606).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-616

In the Matter of

Amendment of Section 73.202(b), RM-7018
Table of Allotments,
FM Broadcast Stations.
(Panama City Beach, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 21, 1991; Released: March 8, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 135 (1990), issued in response to a petition for rule making filed by Winstanley Broadcasting, Inc. ("Winstanley"), licensee of Station WPCF(FM), Channel 261A, Panama City Beach, Florida, proposing the substitution of Channel 261C3 for Channel 261A at Panama City Beach and modification of its license to specify the higher powered channel. Winstanley and Emerald Coast Broadcasting, an applicant for Channel 262A, Niceville, Florida, filed supporting comments.

2. Winstanley in its comments states that the reference coordinates specified in the *Notice of Proposed Rule Making* are not feasible, because the coordinates are located on a U.S. military installation. Winstanley notes that in its original petition for rule making it demonstrated that Channel 261C3 could be allotted to Panama City Beach in full compliance with the Commission's city grade signal and minimum distance separation rules provided two of the twelve applicants for a new FM station on Channel 262A at Niceville, Florida, could relocate their transmitter sites. Winstanley also offered to reimburse the two Niceville applicants for the reasonable expenses associated in relocating their transmitter sites. Winstanley requests the Commission to consider the merits of its original proposal. Emerald, one of the two applicants that would have to move if Winstanley's proposal was granted, states that Winstanley has offered to reimburse it for all legal, engineering and other costs associated with the filing of an amendment to its pending application.

3. We believe the public interest would be served by substituting Channel 261C3 for Channel 261A at Panama City Beach since it would provide the community with a wide coverage area FM station. In order to enable Winstanley to proceed with the channel substitution at Panama City Beach, we will allot Channel 261C3 at the petitioner's originally proposed site, in compliance with the minimum distance separation requirements. This site is 10.1 kilometers (6.3 miles) east[1] of the community, rather than at the site 15.5 kilometers (9.6 miles) southeast of the community as proposed in the *Notice*.[2] The site restriction will avoid short-spacings to the vacant allotment of Channel 262A at Niceville, Florida, and to ten of the twelve applicants for the channel. [3] In accordance with Section 1.420(g) of the Commission's Rules, we are modifying the license of Station WPCF(FM) to specify operation on Channel 261C3 in lieu of Channel 261A at Panama City Beach. Finally, we note that there is no Commission requirement for reimbursement to applicants for a channel allotment. Only licensees and permittees are entitled to reimbursement. *See, e.g., Glenenden Beach, Sweet Home and Toledo, Oregon*, 4 FCC Rcd 7796 (1989). Therefore, Winstanley need not reimburse any applicants for the Niceville channel.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Panama City Beach, Florida	261C3, 286C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WPCF(FM), Panama City Beach, Florida, IS MODIFIED, to specify operation on Channel 261C3 in lieu of Channel 261A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the following two applicants for Channel 262A at Niceville, Florida:

Emerald Coast
Broadcasting, Inc.
618 St. Martin Cove
Niceville, Florida 32578
(BPH-880323MG)

Plenn H. Phelps
1418 Bay Shore Drive
Niceville, Florida 32578
(BPH-880317MG)

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 261C3 at Panama City Beach are North Latitude 30-11-00 and West Longitude 85-42-00. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules with respect to the vacant but applied for Channel 262A at Niceville, Florida, at coordinates 30-31-18 and 86-29-36. *See* 47 C.F.R. § 73.213(c).

[2] The coordinates proposed in the *Notice* for Channel 261C3 at Panama City Beach are North Latitude 30-06-32 and West Longitude 85-39-56.

[3] This site is short spaced to the sites specified in the applications of Plenn H. Phelps (BPH-880317MG) and Emerald Coast Broadcasting, Inc. (BPH-880323MG). These applicants will be served with copies of this *Report and Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-48

In the Matter of

Amendment of Section 73.202(b), RM-7621
Table of Allotments,
FM Broadcast Stations.
(Milford, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 22, 1991; Released: March 8, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by 202 Data Systems ("petitioner") requesting the allotment of Channel 271C2 to Milford, Iowa, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 271C2 to Milford, Iowa, since it could provide the community with its first local FM service. Channel 271C2 can be allotted to Milford in compliance with the Commission's minimum distance separation requirements with a site restriction of 3 kilometers (1.9 miles) northwest of the community to avoid a short-spacing to Station KAYL-FM, Channel 268C1, Storm Lake, Iowa.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Milford, Iowa	---	271C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 29, 1991,** and reply comments on or before **May 14, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Kevin W. Galbraith, President
202 Data Systems
Station Square Three
Paoli, Pennsylvania 19301
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 271C2 at Milford are North Latitude 43-20-33 and West Longitude 95-07-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-562

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Ballston Spa and Saratoga Springs, New York) RM-7525

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 22, 1991; Released: March 8, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Saratoga Radio Corporation ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 7043 (1990), proposing the reallotment of Channel 272A from Saratoga Springs, New York, to Ballston Spa, New York, and the modification of Station WQQY(FM)'s license to specify Ballston Spa as its community of license. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by reallotting Channel 272A from Saratoga Springs to Ballston Spa, New York, and by modifying Station WQQY(FM)'s license accordingly. We believe that petitioner has sufficiently shown that the reallotment of Channel 272A to Ballston Spa will result in a preferential arrangement of allotments. Ballston Spa, with a population of 4,711 persons and the seat of Saratoga County, will be provided with a first local FM service. Saratoga Springs, on the other hand, will continue to receive local aural transmission service from Station WKAJ(AM) and noncommercial educational Station WSPN. The reallotment could enable Station WQQY(FM) to increase facilities from its present 3 kW to 6 kW, thereby expanding its coverage area. In addition, the reallotment of Channel 272A to Ballston Spa could eliminate the present 12 kilometer (7.5 mile) short-spacing to second adjacent Station WEQX, Channel 274B, Manchester, Vermont. Finally, we note that the allotment of Channel 272A at Saratoga Springs and Ballston Spa are mutually exclusive.

3. Channel 272A can be allotted to Ballston Spa in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.2 kilometers (8.8 miles) south of the community to avoid short-spacings to Stations WJIV, Channel 270B, Cherry Falls, New York, and WEQX(FM), Channel 274B, Manchester, Vermont, as well as to accommodate petitioner's desired transmitter site.[1] Canadian concurrence has been received since Ballston Spa is located within 320 kilometers (200 miles) of the U.S.-Canadian border. We will modify Station WQQY(FM)'s license to specify the new community pursuant to Commission rule 1.420(i).

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Ballston Spa, New York	272A
Saratoga Springs, New York	--

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Saratoga Radio Corporation for Station WQQY(FM), Channel 272A, IS MODIFIED to specify Ballston Spa, New York, in lieu of Saratoga Springs, New York, as its community of license, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WQQY(FM)'s license, BLH-4048, except the community of license, as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-4048, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 272A at Ballston Spa are North Latitude 42-52-44 and West Longitude 73-51-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 8, 1991

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. Typically, these responses to individuals are not published in the FCC Record (*See* 0.445(a) of the rules).

These decisions are available for public inspection. Periodically, the Managing Director releases a Public Notice listing the decisions he has made on these matters. The decisions are placed in General Docket 86-285. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director decisions are released for information:

B & B Broadcasting, Inc. - Request for refund of a filing fee - *Denied* (December 27, 1990).

Central Oklahoma Communications Co. - Request for a refund of a hearing fee of $6,760.00 filed for a Notice of Appearance at Byng, Oklahoma - *Granted* (November 1990).

Dean Brothers Broadcasting Corp. - Request for refund of a $6,760 hearing fee - *Granted* (December 27, 1990).

Fuller-Jeffrey Broadcasting Corporation of Greater Des Moines - Request for refund of filing fee of $1,565 of station (WJJY(FM), Greater Des Moines - *Granted* (November 9, 1990).

Hughes-Moore Associates, Inc. and Ms. Ethel Huff - Request for refund of hearing fees for a new FM station in London, Kentucky - *Denied* (November 9, 1990).

J. R. McClure, d/b/a Harlem Media Company - Request for refund of filing fee - *Dismissed as moot* (December 27, 1990).

Ethel Huff and Hughes-Moore Associates - Request for refund of refund of a hearing fee for a new FM station at London, Kentucky - *Denied* (January 23, 1991).

Lawson, James W. - Request for acceptance of a late filed Notice of Appearance and hearing fee in MM Docket No. 90-273 - *Granted* (February 14, 1991).

Lisbon Communications, Inc. - Request for refund of a $6,760.00 hearing fee for new FM station at Lisbon, New Hampshire - *Granted* (December 13, 1990).

Larue County Broadcasting - Request for refund of filing fee to relocate station WRZI(FM), Buffalo, Kentucky - *Denied* (November 9, 1990).

Maines Broadcasting Company - Request for waiver of a hearing fee - *Dismissed* (December 27, 1990).

Ohana Broadcasting - Request for deferral of a hearing fee - *Dismissed as Moot* (December 27, 1990).

Olive Branch Communications, Inc. - Request for reconsidertion of Judge's Ruling - *Dismissed and Returned to Review Board* (December 18, 1990).

North Country Broadcasting Co., Inc. - Request forrefund of a $6,760.00 hearing fee for a new FM station at Malone, New York - *Granted* (February 15, 1991).

Profile Broadcasting Co. - Request for refund of a hearing fee - *Denied* (December 13, 1990).

Pyramid Broadcasting, Inc. - Request for refund of a $6,760.00 hearing fee for a new FM station (Channel 273A) at Whitehall, Michigan - *Granted* (February 15, 1991).

Boy Scouts of America, Radio Explorers Post 1440 - Request for waiver of a filing fee for Restricted Telephone Operator Permit - *Deferred Pending Commission determination* (January 28, 1991).

Starsys, Inc. - Request for a partial refund of $43,200 filing fee for authority to construct a low earth orbit mobile satellite system - *Granted* (February 6, 1991).

Savoie, Gary P. - Request for a refund of a $6,760.00 hearing fee for a new FM station at Walpole, New Hampshire - *Granted* (January 14, 1991).

Sequoyah Communications Corporation (Sequoyah) - Request for refund of a $6,760.00 hearing fee for a new FM station at Roland, Oklahoma - *Granted* (January 14, 1991).

Smyrna Broadcasting, Alice R. Williams, George S. Flinn - Request for refund of a $6,760.00 hearing fee for a new FM station at Smyrna, Tennessee. - *Granted* (January 3, 1991).

Sea Scout Association - Request for a waiver and refund of a filing fee - *Deferred pending Commission determination* (November 9, 1990).

Tamarack Communications, Inc. - Request for a waiver of a filing fee for a station (KNTA(AM)), Santa Clara, California - *Referred to Mass Media Bureau for determination* (February 15, 1991).

WRZZ, Ravenswood, West Virginia (MediaCom, Inc.)-Request for a refund of the filing fee - *Denied* (February 15, 1991).

WSB of Norfolk, Inc. - Request for refund of an overpayment for station WNVZ(FM) Norfolk, Virginia - *Granted* (December 27, 1990).

Woods Hole Oceanographic Institution - Request for refund of a filing fee re inspection of the Atlantis II-Denied (November 9, 1990).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, ACTING CHIEF, FEE SECTION ON 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal No. 395
BellSouth Telephone Companies Revisions to Tariff F.C.C. No. 4	Transmittal No. 354
Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68	Transmittal No. 2039
US West Communications Revisions to Tariff F.C.C. No. 1	Transmittal No. 127

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 1991; Released: February 22, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On August 6, 1990, the Commission released the *Reconsideration Order* in the individual case basis (ICB) DS3 proceeding[1] which, among other things, directed certain carriers providing "dry," or "dark," fiber services to file tariff revisions that establish generally available, averaged rates for this service not later than 30 days from the release date of that Order. "Dry," or "dark," fiber has been defined as unpowered cable, the provision of which does not include the electronics which are necessary to power or "light" the fiber.[2] In two subsequent Bureau Orders [3] the filing date was extended and the carriers, including the Bell Atlantic Telephone Companies (Bell Atlantic), the BellSouth Telephone Companies (BellSouth), Southwestern Bell Telephone Company (SWB), and US West Communications (US West), were required to file general dark fiber rates by November 1, 1990. The filing date was deferred so that the Bureau could consider petitions for waiver of the dark fiber filing requirement filed by the subject carriers and to allow carriers additional time to formulate rates.[4] On October 26, 1990, the Bureau denied the petitions for waiver of the dark fiber filing requirement,[5] and the carriers affected by the requirement filed the instant tariff revisions to establish general, averaged dark fiber rates. Various parties filed petitions against the tariff revisions,[6] to which the carriers replied. The tariff revisions are scheduled to become effective February 23, 1991.

2. For the reasons discussed below, we suspend a portion of each carrier's dark fiber charge, institute an investigation into the rates, and allow the remaining portions of the charges to take effect. In addition, we are suspending specific provisions of the carriers' tariffed terms and conditions which raise questions of lawfulness sufficient to warrant investigation.

II. DISCUSSION OF ISSUES

A. Rate Levels

1. Positions of the parties

3. Petitioners generally argue that the local exchange carriers' (LECs) dark fiber rates are excessive and not adequately cost supported. MCI asserts that Bell Atlantic's dark fiber rates appear to be recovering the cost of fiber and conduit in Bell Atlantic's channel termination charge as well as Bell Atlantic's per mile charge. MCI Petition at 8. MCI claims that Bell Atlantic violates Section 61.38(b)(2) of the Commission's Rules because its nonrecurring charges do not equal the specific costs of provisioning and installing dark fiber service. *Id.* at 11. MCI provides a cost analysis that it says demonstrates that Bell Atlantic's dark fiber rates are excessive, unsupported, and contradict data Bell Atlantic filed with the Commission in other proceedings. *Id.* at 9-10. MAT contends that while Bell Atlantic formerly claimed that its ICB dark fiber rates were cost based Bell Atlantic now claims that significantly higher general rates are also cost based. MAT Petition at 2. WTG asserts that Bell Atlantic charges customers to recover costs which Bell Atlantic itself does not incur, thereby violating the fundamental principle that rates must be cost based to be reasonable. WTG Petition (Bell Atlantic) at 3. This, contends WTG, appears to be indicative of strategic pricing which the Commission recently criticized. *Id.*

4. Bell Atlantic replies that its dark fiber rates are fully cost supported. Bell Atlantic Reply at 7. The channel termination rate element, argues Bell Atlantic, is properly included in its dark fiber offering because that element does not pertain solely to electronic equipment, as MCI contends. *Id.* at 9. Bell Atlantic further argues that no double recovery occurs because the per mile rate and channel termination rate elements cover entirely different serving configurations. *Id.* at 10 n.22. Bell Atlantic states that MCI's cost analysis is deficient because that analysis fails to account for conduit rental costs, which are included in the general rate and which constitute a substantial portion of the costs of providing dark fiber. *Id.* at 11. MCI's analysis is also faulty because, Bell Atlantic claims, it ignores fiber size in calculating per strand cost and because MCI ignores the fact that many fiber strands are spares maintained for future growth and are not revenue producing. *Id.* Bell Atlantic argues that it currently has no better estimate of the nonrecurring costs of dark fiber facilities than its DS3 nonrecurring costs. *Id.* at 13-14.

5. MCI argues that BellSouth's dark fiber filing violates the *Reconsideration Order* because it is merely a refiling of BellSouth's existing DS3 rates and not a true dark fiber general rate as the Order requires. MCI Petition at 13. BellSouth's cost support includes central office and customer premises elements which have no connection to the provision of dark fiber. *Id.* MCI asserts that BellSouth's channel termination rate is based on DS3

costs, and fixed per mile interoffice channel charges are identical to BellSouth's existing DS3 tariff. *Id.* at 14. WTG asserts that BellSouth's rates contain cost elements that are wholly unrelated to dark fiber service, illustrating that the rates are unjust and unreasonable. WTG Petition (BellSouth) at 2. WTG further asserts that BellSouth's description and justification lacks any showing on demand, cross elasticity, cost support, or other data required under Section 61.38 of the Commission's Rules. *Id. at 4.*

6. BellSouth replies that its use of the cost support for single channel DS3 service for dark fiber is appropriate because BellSouth will integrate its dark fiber offering into its DS3 general offering 30 days after the effective date of the tariff. BellSouth Reply at 2. BellSouth states that its showing goes beyond the net revenue showing it is required to make under the recently effective price cap *Id.* at 2. The argument advanced by MCI and WTG that dry fiber rates exceed the cost of service supports the supposition that BellSouth meets the net revenue test since revenue achieved would be in excess of the incremental cost of service. *Id.* at 3.

7. Petitioners generally argue that SWB's dark fiber rates are unjust and unreasonable because the rates are the same as SWB's MegaLink Custom Optical Service rates which recover the cost of electronics that are not needed for dark fiber service. MCI Petition at 16; STARS Petition at 1-2; US Sprint Petition at 3. MCI performs a unit cost study which it claims demonstrates that SWB's dark fiber rates are unjust and unreasonable. *Id.* at 17-18. STARS argues that SWB's dark fiber rates were filed without any supporting cost and economic information as required by Section 61.38 of the Commission's Rules. STARS Petition at 1-2. STARS claims that it will be forced to pay for electronic equipment not provided by SWB under SWB's dark fiber rates, noting that STARS has invested approximately $200,000 in electronics in reliance on existing contracts it has with SWB. *Id.* US Sprint contends that a rate structure based on the provisioning of a number of DS3 circuits is irrelevant as applied to dark fiber since the customer supplies the electronics and therfore determines service transmission speed, *i.e.*, the bit rate. US Sprint Petition at 3. WTG claims that SWB's general offering will increase WTG's dark fiber rates at least 161 percent to 448 percent, an increase directly attributable to SWB's decision to charge dark fiber customers for items wholly unrelated to the provision of dark fiber service. WTG Petition (SWB) at 4.

8. SWB replies that its dark fiber offering properly includes optical rate elements because the service is a premises-to-premises high capacity service providing optical interfaces at a fixed speed of 45 Mbps and higher. SWB Reply at 4. SWB argues that the costs of providing bit rate "encumbered" dark fiber are the same as the cost of providing custom optical service. *Id.* at 4-6. The costs of electronics are properly included in the general offering, contends SWB, because SWB will provide central office electronics for monitoring and testing interoffice efficiencies as part of the standard dark fiber design. *Id.* at 8. SWB asserts that dark fiber rates only recover costs for channel termination equipment located in the serving wire center, not at customer premises. Only the cost of "lightwave terminating equipment" located at the customer premises will be recovered by the rate. *Id.* According to SWB, MCI's cost study is flawed because it utilized Bell Atlantic and BellSouth's network design, demand, cost methodology, and cost input data. *Id.* at 9-10.

9. MCI asserts that US West has inaccurately developed rates, has not provided sufficient cost justification, and has included unreasonable terms and conditions for dark fiber service. MCI Petition at 19. MCI claims that it was unable to produce a unit cost study for US West because the carrier's 1989 Form M filed with the Commission is incomplete and does not contain its fiber investment for each of its study areas. Without this information, evaluation of dark fiber rates is not possible and the Commission should therefore reject this filing. *Id.* at 19. MCI contends that US West's filing is deficient because: its nonrecurring rate for establishing dark fiber service is completely unsupported; its nonrecurring per order charge is not sufficiently described or justified; its recurring dark fiber rate per mile element includes capital expenses in the development of a rate element that contains no capital; and the tariff includes a rate element designated "other" which allows US West to charge whatever it wants in cases in which US West is required to remove obstructions to lay fiber cable. *Id.* at 19-22.

10. WTG argues that the US West charge would recover the total investment in the offering that would normally be recovered over the life of the fiber being installed. WTG contends that the time limitation on the general dark fiber offering and the imposition on dark fiber customers of the full costs for facilities are unreasonable. WTG Petition (US West) at 2-3. According to WTG, US West's projection of migration of customers from DS3 to dark fiber is dubious in view of US West's comparatively high dark fiber rates. Even if migration does occur, US West should not suffer any lost investment since it can sell its dark fiber to dark fiber customers. *Id.* at 3. WTG asserts that US West's dark fiber recurring and nonrecurring charges represent increases of 85 percent and 1303 percent, respectively, over US West's current rates. *Id.* at 4. These increases appear to be attributable to dubious demand projections and cost assumptions. *Id.* at 5.

11. In reply, US West states that it has complied fully with Section 61.38 and used standard costing methodology, including a net revenue test. US West contends that the costs of providing dark fiber service include both direct costs and cross-elastic effects on DS3 services. US West maintains that its 1989 Form M is complete and was filed in compliance with Commission requirements. US West Reply at 9-10. US West contends that its dark fiber establishment charge is based on present value of the recurring cost over the remaining service life of the cable beyond the August 6, 1991, expiration date of the US West dark fiber offering. The charge ensures, asserts US West, that neither shareholders nor ratepayers subsidize customers who purchase dark fiber service between now and August 6, 1991. *Id.* at 10-11.

12. US West further asserts that recurring charges were calculated using the investment necessary to provide dark fiber over the average ten-year life of the installation. These charges will be recovered until the tariff expires August 6. Recurring charges for the remaining life of the installation are recovered through the establishment charge. Therefore there is no double recovery of capital costs. *Id.* at 11-12. US West posits that its monthly $9,200 per mile charge covers both direct and cross-elastic costs and produces a positive net revenue. *Id.* at 12. According to US West, the dark fiber "other" rate element only applies if extraordinary efforts are associated with cable

placement or if cable is placed under water. The rate element is based on actual costs and is determined on a case-by-case basis. *Id.* at 13.

2. Discussion

a. Carrier rates

13. The petitioners in this case object that the substantial increases embodied in the proposed rates of the four carriers are largely based on costs not incurred in the provision of dark fiber service. An offering of dark fiber provides an optical transmission path between two points but, in contrast to DS3 and other Special Access services provisioned over optical fiber, does not provide the electronics and other equipment necessary to send and receive light pulses along the fiber. The customer must arrange to provide and maintain this equipment itself.

14. We have reviewed the various transmissions, the petitions, and the replies. This review provides substantial reason to believe that the rates filed by each of these carriers are excessive. For example, the magnitude of some of the apparent rate increases is unusual, in view of the fact that the only required change is that the dark fiber offerings be made generally available. The justifications for these increases also appear weak. In particular, there is substantial reason to believe petitioners claims that these dark fiber rates include costs of equipment and facilities not needed or used by dark fiber customers. We have accordingly decided to initiate an investigation to determine whether the rates exceed rates that would be just and reasonable.

b. Rate structure

15. Each of the four companies has chosen different rate structures for its dark fiber offering. BellSouth has used its existing rate structure and rates for DS3 service, an end-to-end service providing both a transmission path and electronics to maintain a transmission rate of 44.736 Mbps. DS3 is frequently provided over a single optical fiber. *See, e.g.*, SWB Reply at 4-6. The existing rate structure for DS3 includes the following rate elements: (1) Local Channel;[7] (2) Fixed Interoffice Channel;[8] and (3) Interoffice Channel Per Mile Mileage.[9] This rate structure does not appear to be appropriate for dark fiber service because the DS3 Local Channel rate element recovers, in addition to cable and wire costs (C&WF), the central office equipment (COE) costs incurred to provide DS3 service. For dark fiber, however, there are no COE requirements. Also, the Local Channel rate element appears to be inappropriate for dark fiber because while DS3 must terminate at the serving wire centers, there is no such requirement for dark fiber. The Fixed Interoffice Channel rate element likewise appears to be inappropriate because it recovers only COE expenses for multiplexing and terminating equipment associated with providing DS3 service. The Interoffice Channel Mileage rate element appears to be the only appropriate rate element for dark fiber.

16. Southwestern Bell uses its existing MegaLink Custom Optical service (DS3) rates for dark fiber rates. The rates are presented in the form of a matrix based on mileage and the number of "dim fiber" DS3s. Southwestern Bell's rates include the same COE expenses that BellSouth would include in its rates. Further, Southwestern Bell's matrix approach appears to be unworkable because the number of miles and the number of DS3 "dim fiber" circuits are required as input to the matrix to obtain a rate and there are, for unencumbered dark fiber, no DS3 "dim fibers." We note that Southwestern has a pending tariff filing to revise its DS3 rate structure.[10] Both the current matrix approach and the channel termination and fixed mileage rate elements included in Southwestern's revised DS3 rate structure appear inappropriate for dark fiber service because, as explained above, both methods include COE expenses.

17. Bell Atlantic uses a rate structure which includes a Channel Termination rate element and a per mile rate element. The Channel Termination rate element contrasts with the BellSouth and Southwestern Bell channel terminations in that only the fully distributed costs of C&WF[11] are included. The per mile rate element would recover the fully distributed costs of the fiber optic cable and conduit. While Bell Atlantic's channel termination rate element does not include COE, it appears to be an inappropriate rate element for the same reasons discussed above.

18. US West uses a dark fiber rate structure that includes the following rate elements: (1) an Establishment Charge for up to 12 strands; (2) a Basic Charge for four fibers for bands of 0-8 miles, 8-25 miles and over 25 miles; and (3) an Other Charge for placing conduit and for extraordinary costs incurred to bury cable. US West apparently, as MCI argues, recovers the net present value of all future costs attributable to fiber in its Establishment Charge and, in its recurring basic charge, again recovers its costs. We believe an investigation is necessary to determine the reasonableness of US West's Establishment Charge. We have tentatively concluded that the charge is inappropriate because it recovers costs which would be recovered on a per mile basis under the recurring basic charge. Further, US West's Other Charge for placing conduit or for extraordinary construction costs appears inappropriate. It is our tentative view that all normal costs for conduit should be included in the basic rate and extraordinary conduit costs and construction should be performed under a special construction tariff.

c. Investigation; interim structure and rates

19. We have reviewed the various tariff filings, the descriptions and justifications submitted in support of the filings, and the related pleadings. We conclude that the rates for dark fiber service raise substantial questions of lawfulness that warrant investigation. However, we believe that carriers may be required to charge a portion of the rates they have filed, on an interim basis.

20. Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), provides in pertinent part:

> Whenever there is filed with the Commission any *new or revised* charge . . . the Commission may suspend the operation of *such charge . . . in whole or in part* but not for a longer period than five months beyond the time when it would otherwise go into effect . . . .

(Emphasis added.)

21. Given the history of this proceeding, in conjunction with the Commission's demonstrated desire to protect dark fiber customers by ensuring that reasonable, generally available dark fiber service is available in a timely

manner, we will suspend a portion of the rates for five months, and initiate an investigation of the carriers' dark fiber general rates and certain rate structure questions as well as certain terms and conditions contained in the dark fiber tariffs. As discussed in the following paragraphs, to determine what portion of the carriers' dark fiber rates should be suspended, we have estimated the per mile cost of dark fiber by using the relationship between investment and revenue requirement which produces surrogate rates. In view of the foregoing discussion, we tentatively conclude that only a per mile charge and the proposed NRCs (with the exception of US West's Establishment Charge) should be assessed. *See* Appendix.

22. Based on an analysis of the companies' investments in fiber optic cable, we have developed per mile rates which appear to reflect costs more accurately using the following method. The revenue requirement attributable to the fiber optic cable investment was developed through the following four-step process: (1) a ratio of revenue requirement to investment was calculated for the Special Access category;[12] (2) the investment in fiber optic cable was determined;[13] (3) the revenue requirement for the fiber optic cable investment was calculated using the same revenue requirement to investment ratio developed in Step 1 for the Special Access category;[14] and (4) the per mile per strand revenue requirement for fiber optic cable was calculated by dividing the revenue requirement associated with fiber by the miles of revenue producing fiber.[15]

	Bell Atlantic	BellSouth	South-western	US West
Proposed Rate (per mile/ strand)	$764	$158[16]	--[17]	$2300[18]
Allowed Rate (per mile/ strand)	$132	$159	$112	$266

23. Our decision to use this methodology for purposes of a Section 204(a) partial suspension is not, of course, a final determination that rates produced by that methodology are just and reasonable. The rate level portion of this investigation is not limited to the suspended portion of the rates that the carriers filed. If the Commission should decide to prescribe rates at the end of this investigation, the prescribed rates may be higher or lower than the interim rates that result from this partial suspension.

B. Terms and Conditions

1. Positions of the parties

24. Petitioners generally condemn provisions included in BellSouth and US West tariffs that automatically terminate their dark fiber offerings. *See, e.g.*, MCI Petition at 13; US Sprint Petition at 2; WTG Petition (BellSouth) at 4; WTG Petition (US West) at 5. These petitioners allege that BellSouth and US West cannot discontinue dark fiber service without Commission authorization as required by Section 214 of the Communications Act, 47 U.S.C. § 214. US Sprint Petition at 2; WTG Petition (BellSouth) at 5; WTG Petition (US West) at 6. WTG maintains that the LECs have an obligation to provide service upon a reasonable request under Section 201 of the Communications Act, 47 U.S.C. § 201. WTG Petition (US West) at 6.

25. BellSouth replies that its 30-day limitation on its general dark fiber offering is not unlawful since the Commission did not require that carriers provide the service on a permanent basis. Rather the Commission only required that BellSouth file averaged rates for the service. BellSouth Reply at 3. Moreover, BellSouth argues, Section 201 does not require BellSouth to provide a generalized dark fiber offering, nor does Section 214 require Commission certification to implement the 30-day expiration provision. *Id.* at 4. BellSouth maintains that the interconnection obligations of a carrier can only be determined by the Commission in an appropriate proceeding after a full hearing. *Id.* at 5.

26. Similarly, US West argues that termination of its dark fiber offering does not require prior Commission approval because Section 214 is not directed at specific service offerings. Even if the section is construed to apply to a specific service, contends US West, it is inapplicable to service provided by one carrier to another. US West claims that all of its dark fiber is provided to other carriers. US West Reply at 7-8. In any event, US West states that it has filed a Section 214 application so that it will be able to discontinue dark fiber service upon Commission approval. *Id.* at 8-9.

27. Several petitioners assert that SWB seeks to restrict the "bit rate" of its dark fiber offering in an attempt to tie those rates to its MegaLink Custom Optical Service, *i.e.*, so SWB can charge dark fiber rates which are based on its DS3 "dim fiber" rates. *See, e.g.*, MCI Petition at 17; US Sprint Petition at 3; WTG Petition (SWB) at 2-3. The petitioners generally argue that SWB's attempt to justify its dark fiber rates based on the number of DS3s a fiber may carry is disingenuous since the customer controls the electronics and, consequently, controls the speed of transmission, otherwise known as "bit rate," which determines the number of DS3s that a fiber can carry. *Id.*

28. SWB replies that it provides "specialized bit rate encumbered" dark fiber service arrangements which restrict, pursuant to contract and tariff, the speed at which customers may transmit information through the facilities. SWB Reply at 4. SWB maintains that it has never offered "unencumbered" dark fiber and that the Commission lacks the authority to require it to offer "encumbered" dark fiber service on a going-forward basis. *Id.* at 1-2. SWB asserts that no standard definition exists for dark fiber service and the Commission has never defined dark fiber or ruled that dark fiber is a Title II communications service. *Id.* at 4. "Unencumbered" dark fiber, claims SWB, is a facility and not a service, and the Commission has no grounds to order the tariffing of facility construction. *Id.* at 3-4.

29. US Sprint argues that the restriction of dark fiber offerings to five-year service periods by Bell Atlantic is unreasonable and unjustified. US Sprint Petition at 3. In response, Bell Atlantic asserts that all of its existing dark fiber ICBs have minimum service periods of five years or more, so similar terms contained in its general tariff offering are reasonable. Bell Atlantic Reply at 6. MCI argues that none of the LECs has provided a credit mechanism in its tariff which would protect customers who made "up-front" payments or prepayments to cover

the total cost of underlying facilities and overhead operating expense for special, fiber optic construction. *See, e.g.*, MCI Petition at 4-5, 6-7, 13, and 16.

30. In reply, Bell Atlantic states that it has a credit mechanism for up-front payments made by dark fiber customers which is contained in Transmittal 385, which became effective November 29, 1990. Bell Atlantic Reply at 2. With the exception of US West, the remaining carriers state that they are willing to revise their tariffs to include a mechanism to establish credit for customers who made up-front payments for dark fiber service. BellSouth Reply at 3; SWB Reply at 7. US West maintains that it did not include a credit mechanism in its tariff because existing ICBs will still be in effect throughout the life of the general tariff, *i.e.*, until August 6, 1991, and transition of ICBs to general rates is not anticipated. According to US West, since the terms of each ICB arrangement are unique, it would be inappropriate to apply a common credit or refund mechanism to these disparate contracts. US West says it will discuss the impact of premature termination under existing contracts with its ICB customers to resolve the prepayment issue; it maintains that the issue is unrelated to the dark fiber general filing. US West Reply at 6.

2. Discussion

31. The Common Carrier Bureau has reviewed the various provisions of the transmittals before us in this proceeding as well as the related pleadings. We conclude that the specific provisions, or lack of provisions, discussed above raise issues which warrant suspension and investigation.

32. With regard to the automatic termination provisions included in the tariffs filed by BellSouth and US West, we are reluctant to conclude, as these carriers would have us do, that termination of their dark fiber offerings after 30 days is somehow consistent with the express requirements established by the Commission in the *Reconsideration Order*. BellSouth and US West should be given an opportunity to explain their views regarding this question of consistency in the investigation we initiate in this Order, but the termination provisions must by suspended for five months during the pendency of the Commission's investigation in order to protect the interests of these carriers' customers.

33. The bit rate restrictions included in SWB's dark fiber tariff raise similar issues of consistency with the *Reconsideration Order*. SWB's claims that "encumbering" its dark fiber tariff with bit rate restrictions is beyond the reach of the Commission's authority raise central issues regarding the carriers' obligation to comply with the requirements established in the *Reconsideration Order*. SWB's direct case in the investigation proceeding can serve as a vehicle for shedding further light on its views regarding its obligation under that Order. In the meantime, however, the bit rate restrictions must be suspended in order to preserve the apparent general nature of the SWB offering and thus protect the interests of its customers.

34. We believe that US Sprint has raised serious questions regarding the five-year term requirements imposed by Bell Atlantic, since the Commission may be compelled to conclude that such a term commitment would substantially erode the Commission's requirement that dark fiber offerings be made generally available to all customers. Suspension of this provision of the Bell Atlantic tariff is warranted in order to save customers from the need to make such a service commitment while the Commission examines the lawfulness of the requirement.

35. The issue of credit mechanisms for payments already made by the carriers' ICB customers is an important one because it may be relevant to the Commission's ultimate determination of the reasonableness of the general rates. We believe the matter should be included in the Commission's investigation to ensure a satisfactory resolution.

III. ISSUES DESIGNATED FOR INVESTIGATION

36. We hereby designate the following issues for investigation in this proceeding:

(1) Are the carriers' dark fiber rates just and reasonable?

(2) Do the ratemaking methodologies employed by the carriers ensure that the resulting dark fiber rates will reasonably reflect the cost of dark fiber service?

(3) What rate structure is suitable to reflect dark fiber costs? For instance, to what degree should dark fiber service costs be recovered by NRCs, fixed charges, and per mile charges?

(4) Do the following carrier tariff provisions constitute unreasonable terms and conditions which conflict with the Commission's *Reconsideration Order* or otherwise constitute unreasonable practices?

(a) BellSouth, SWB and US West provisions which automatically terminate their general dark fiber offerings or state that the offering may be of a limited duration.

(b) SWB's restriction on the bit rate a customer is permitted to generate over the dark fiber facility.

(c) Bell Atlantic's restriction of its dark fiber offering to a five-year service period.

(5) Should carriers be required to provide credit for payments already made by dark fiber ICB customers?

IV. PROCEDURAL REQUIREMENTS

37. Bell Atlantic, BellSouth, SWB, and US West are directed to file their direct cases in response to these issues not later than March 22, 1991. The direct cases should respond to designated issues by referencing the numbers and letters used as designations in paragraph 36, *supra*. The carriers' direct cases must supply all information upon which they rely to support their positions. Interested parties may file oppositions to the direct cases not later than April 5, 1991. Pleadings opposing a direct case must be captioned "Opposition to Direct Case" or "Comments on Direct Case" and shall specifically identify the issue or the section of the pleading to which it responds. The carriers may file a "Reply" to oppositions or comments no later than April 15, 1991. All pleadings must be organized to reflect the issues designated in this Order.

38. *Ex parte* contacts (*i.e.*, written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any mem-

ber, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed, on the same day submitted, with the Secretary for inclusion in the public file. A written summary of oral *ex parte* presentations must be served, on the same day presented, on the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200, *et seq.*, of the Commission's Rules, 47 C.F.R. § 1.1200, *et seq.*

V. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED that the provisions of the BellSouth Telephone Companies tariff that automatically terminate its general dark fiber offering, contained in Sections 7.2.10 and 7.5.12 of its tariff, and the footnotes associated with those sections, ARE SUSPENDED.

40. IT IS FURTHER ORDERED that the provisions of the US West Communications tariff that automatically terminate its general dark fiber offering, contained in Section 18.2 of its tariff, ARE SUSPENDED.

41. IT IS FURTHER ORDERED that the language in the Southwestern Bell Telephone Company tariff that states that its general dark fiber offering may be of limited duration, contained in Section 20.1.4(E) of its tariff, IS SUSPENDED.

42. IT IS FURTHER ORDERED that the provision of the Southwestern Bell Telephone Company tariff that restricts the bit rate a customer can provide over the dark fiber facility, contained in Section 20.2.6(D) of its tariff, IS SUSPENDED.

43. IT IS FURTHER ORDERED that Southwestern Bell Telephone Company SHALL FILE tariff revisions, to be in effect during the period of suspension, which do not restrict the bit rate that a customer can order under its general dark fiber tariff not later than five business days after the release of this Order to be effective on not less than 10 days' notice.

44. IT IS FURTHER ORDERED that the provision of the Bell Atlantic Telephone Companies tariff that restricts its dark fiber offering to five-year service periods, contained in Section 7.4.15(4) of its tariff, IS SUSPENDED.

45. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions of the Bell Atlantic Telephone Companies, BellSouth Telephone Companies, Southwestern Bell Telephone Company, and US West Communications ARE SUSPENDED IN PART, in accordance with paragraphs 19-23 and 31-35 above, for the five-month period ending July 22, 1991.

46. IT IS FURTHER ORDERED that, pursuant to Section 204(a) and Section 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation IS INSTITUTED into the lawfulness of the general dark fiber tariffs of the Bell Atlantic Telephone Companies, BellSouth Telephone Companies, Southwestern Bell Telephone Company, and US West Communications described in paragraphs 19-23 and 31-35 above.

47. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies, BellSouth Telephone Companies, Southwestern Bell Telephone Company, and US West Communications SHALL FILE a supplement reflecting this suspension no later than five business days from the release date of this Order.

48. IT IS FURTHER ORDERED that Special Permission No. 91-127 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived for the purpose of complying with this Order.

49. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, and 403, and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the issues set forth in Section III, *supra*, ARE DESIGNATED FOR INVESTIGATION in CC Docket No. 88-136.

50. IT IS FURTHER ORDERED that the petitions to reject or to suspend and investigate the above-captioned transmittals filed by Mid Atlantic Telecom, Inc., Satellite Transmission and Reception Specialist Company, MCI Telecommunications Corporation, US Sprint Communications Company Limited Partnership, and Williams Telecommunications Group, Inc., ARE GRANTED to the extent indicated herein but otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

APPENDIX

FCC ESTIMATE OF THE REVENUE REQUIREMENT FOR SINGLE STRAND FIBER OPTIC CABLE

	BELL ATLANTIC	BELLSOUTH	SOUTHWESTERN	US WEST
1 NET SPECIAL ACCESS REVENUE REQUIREMENT [89 TRP COS-1 P (LN 100(R)]	$438,740,000	$421,642,000	$295,754,000	$265,732,000
2 NET RETURN @12 PERCENT [89 TRP COS-1 (P) LN 630(R)]	$92,845,000	$79,423,000	$63,415,000	$53,327,000
3 REVENUE REQUIREMENT ADJUSTMENT TO 11.25 ROR (0.0075 / 0.12 = .0625) (0.0625 * LN 2)	$5,802,813	$4,963,938	$3,963,438	$3,332,938
4 FEDERAL INCOME TAX ADJUSTMENT (0.5152 * LN 3)	$2,989,609	$2,557,421	$2,041,963	$1,717,129
5 ADJUSTED REVENUE REQUIREMENT (LN 1 LESS LN 3 & LN 4)	$429,947,579	$414,120,642	$289,748,600	$260,681,933
6 AVERAGE SPECIAL ACCESS NET INVESTMENT [89 TRP COS-1 (P) LN 620(R)]	$773,708,000	$661,857,000	$528,449,000	$444,390,000
7 REV REQ/INVESTMENT ADJUSTMENT FACTOR (LN 5 / LN 6)	0.555697	0.625695	0.548300	0.586606
8 AVG NET INVESTMENT IN FIBER OPTIC CABLE (89 FORM M SCHEDULE B-5C)	$388,772,352	$560,671,280	$214,205,746	$286,697,266
9 AVG NET INV IN POLES ATTRIB TO FIBER OPTIC CABLE (DATA REQUEST)	$0	$9,737,488	$0	$152,000
10 AVG NET INV IN CONDUIT ATTRIBUTABLE TO FIBER OPTIC CABLE (DATA REQUEST)*	$110,420,308	$122,696,772	$89,678,794	$89,136,000
11 TOTAL AVG NET FIBER INVESTMENT (LN 8 + LN 9 + LN 10)	$499,192,660	$693,105,540	$303,884,540	$375,985,266
12 REVENUE REQUIREMENT FOR FIBER (LN 7 * LN 11)	$277,400,099	$433,672,698	$166,619,901	$220,555,291
13 FIBER OPTIC CABLE (MILES) (89 FORM M SCHEDULE S-1)	373,398	445,452	270,300	234,851
14 PERCENTAGE LIT FIBER (INDUSTRY ANALYSIS DIVISION DATA)**	46.8	50.9	45.9	29.4
15 MILES OF REVENUE PRODUCING FIBER OPTIC CABLE (LN 13 * LN 14)	174,750	226,735	124,068	69,046
16 REVENUE REQUIREMENT PER REVENUE PRODUCING MILE OF FIBER OPTIC CABLE (LN 12 / LN 15)	$1,587	$1,913	$1,343	$3,194
17 REVENUE REQUIREMENT PER MONTH PER MILE PER STRAND (LN 16 / 12)	$132	$159	$112	$266

NOTES

* CONDUIT DATA WAS UNAVAILABLE FOR BELL ATLANTIC, THEREFORE AN ALLOCATION FACTOR OF 0.28402 WAS APPLIED TO THE FIBER INVESTMENT TO APPROXIMATE THE INVESTMENT IN CONDUIT THAT SUPPORTS FIBER.
(LN 10 BS + SWB + US WEST / LN 8 BS + SWB + US WEST = FACTOR)

** LIT FIBER DATA WAS UNAVAILABLE FOR BELL ATLANTIC, THEREFORE THE INDUSTRY AVERAGE OF 46.8 PERCENT WAS USED AS A SURROGATE.

FOOTNOTES

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 4842 (1990) (*Reconsideration Order), further recon. pending.*

[2] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Memorandum Opinion and Order, 4 FCC Rcd 8634 n.7 (1989) (*ICB Order).*

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order, 5 FCC Rcd 5420 (Com.Car.Bur. 1990); Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order, 5 FCC Rcd 5919 (Com.Car.Bur. 1990).

[4] We note that SWB and US West have filed applications seeking authority to cease providing dark fiber service under generally available tariffs. *See* Southwestern Bell Telephone Company, Application for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Specialized Dark Fiber Arrangements, Nov. 2, 1990 (filed "under protest"); US West Communications, Application for Authority Under Section 214 of the Communications Act of 1934 to Discontinue Providing Dark Fiber Specialized Arrangements, Dec. 14, 1990. These applications have been contested by various parties and are currently being considered by the Commission.

[5] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order, 5 FCC Rcd 6772 (Com.Car.Bur. 1990) (*Waiver Order).*

[6] The following parties filed petitions: Mid Atlantic Telecom, Inc. (MAT), against Bell Atlantic; Satellite Transmission and Reception Specialist Company (STARS), against SWB (late-filed); and MCI Telecommunications Corp. (MCI), US Sprint Communications Company Limited Partnership (US Sprint), and Williams Telecommunications Group, Inc. (WTG), against Bell Atlantic, BellSouth, SWB, and US West.

[7] Local Channel - The DS3 Local Channel termination rate element recovers approximately 49 percent central office equipment (COE) expenses and 51 percent cable and wire facilities (C&WF) expenses. *See* D&J Figure 2-2.

[8] Fixed Interoffice Channel - The fixed portion of DS3 channel mileage rates recovers multiplexing expenses and other COE expenses associated with terminating equipment for DS3. *See* BellSouth Annual Access Filing, Workpaper DS3CM1.

[9] Interoffice Per Mile - Recovers the C&WF costs per mile for DS3 service.

[10] Southwestern Bell is restructuring its DS3 rates to reflect the generally standardized DS3 rate structures used by other LECs. For rates and rate structure, see Southwestern Bell, Tariff F.C.C. No. 68, Transmittal No. 2062, dated January 18, 1991.

[11] Based on Bell Atlantic's average DS3 loop length of 1.91875 miles.

[12] The revenue requirement and investment data for the special access category were obtained from the carriers' 1989 Tariff Review Plans (TRP). The TRP (prospective) revenue requirement data is presented in terms of a 12 percent rate of return rather than the currently authorized 11.25 percent. The return portion was therefore reduced by 0.75 percent and further reduced to reflect the correspondingly lower contribution to federal income tax.

[13] The investment in fiber optic cable and the supporting conduit and poles investment for each company were obtained from the 1989 Form M reports and from the companies. Bell Atlantic conduit data was unavailable; we therefore derived an allocation factor of 0.27750 based on a weighted average of the data received from the other three companies that responded to the Tariff Division's request for data.

[14] The revenue requirement for fiber optic cable was determined by multiplying the investment in fiber optic cable by the special access revenue requirement to investment ratio factor.

[15] Total miles of fiber were obtained from 1989 Form M data and from information provided by the carriers in response to requests for data regarding fiber optic cable. Percentages of "lit" to total fiber were obtained from data provided by the carriers in response to a request for fiber deployment data. *See* Questionaire from Chief, Industry Analysis Division, Common Carrier Bureau, dated Sept. 10, 1990. Data relating to "lit" and dark fiber ratios was not available for Bell Atlantic; we therefore used the industry average of 46.8 percent lit fiber.

[16] It might appear that we are increasing the amount BellSouth can charge for dark fiber. However, the proposed per mile rate shown here only includes the Interoffice Channel per Mile Mileage rate element, and does not include the Local Channel and Fixed Interoffice Channel rate elements. If the other rate elements were included, the total monthly dark fiber rate would be significantly higher, *e.g.*, five miles of dark fiber under BellSouth's proposed rates would be $8062, whereas our allowed rate for the same distance would be $1590.

[17] Southwestern currently includes its per mile charge in its matrix for DS3. Therefore Southwestern's per mile rate is unknown.

[18] Based on the 0-8 mile band.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GRAPHNET, INC. Transmittal Nos. 185 and 188

Revisions to Tariff F.C.C. No. 5

ORDER

Adopted: February 27, 1991; Released: February 28, 1991

By the Chief, Common Carrier Bureau:

1. On January 17, 1991, Graphnet, Inc. (Graphnet) filed Transmittal No. 185, establishing rates for the termination of domestic and international telex calls at $3.00 per minute to Western Union International, Inc. (WUI). Transmittal No. 185 would have charged other interconnected record carriers either $1.23 per minute or 165 percent of the network access rate it is charged by that carrier for the termination of Graphnet's traffic on that carrier's network, whichever is greater. On January 24, 1991, TRT/FTC Communications, Inc. (TRT/FTC) filed a petition to reject or suspend and investigate the tariff, and Graphnet filed an opposition on February 4, 1991. On February 14, Graphnet filed revisions to Transmittal 185, under Transmittal No. 188. TRT/FTC filed a petition against Transmittal 188 on February 20 and Graphnet filed a reply on February 25, 1991. The tariffs are scheduled to become effective March 1, 1991.

2. According to TRT/FTC, Graphnet's tariff does not establish equal and fair division rates with respect to its interconnections with other record carriers. TRT/FTC January 24 Petition at 3. It argues that these rates would be 65 percent higher than the division rates which Graphnet pays it and other record carriers for equivalent services. *Id.* According to TRT/FTC, if these tariff revisions are allowed to become effective, the other record carriers would be required to increase their rates dramatically to subscribers for telex calls to Graphnet subscribers. *Id.* at 4. Finally, TRT/FTC contends that rejection or suspension of Transmittal 185 is required to prevent Graphnet from destroying the public benefits of the existing record carrier interconnection arrangements. *Id.*

3. Graphnet filed further tariff revisions in Transmittal No. 188 on February 14, 1991. Transmittal 188 eliminates the formulation under which other interconnected record carriers would be charged the greater of $1.23 per minute or 165 percent of the rates they charge Graphnet for termination of traffic. Transmittal 188 replaces that structure with flat rates listed in the tariff for terminating domestic inter-network and inbound international telex traffic on the Graphnet network.

4. In its February 20 petition against Transmittal 188, TRT/FTC argues that Graphnet's tariff revisions continue to provide rates which are discriminatory, and that the revisions offer only an improvement in form. TRT/FTC February 20 Petition at 1-2. Graphnet, in its reply, argues *inter alia*, that TRT/FTC "has fallen far short" of the burden imposed by the Commission's Rules on parties petitioning against tariffs filed by non-dominant carriers. Graphnet February 25 Reply at third page (unpaginated).

5. In response to the petition against Transmittal 185 Graphnet argues that the differential between termination rates which it charges and those imposed by other record carriers is driven by a basic difference between its network and the networks of the other record carriers. Graphnet Opposition at 4. Graphnet explains that its network architecture is tailored to high speed usage; however, interconnection arrangements force it to accept traffic which is originated on another carrier's network at a lower speed despite the fundamental incompatibility of the networks. *Id.* at 5. Moreover, Graphnet contends, to provide both in-bound and out-bound interconnected traffic, "special flow control processing operations and network buffering and overheads are required." According to Graphnet, strictures imposed upon interconnection by the other record carriers force Graphnet to incur substantial extra costs for termination of traffic originating on other networks and destined for delivery to a Graphnet subscriber. *Id.*

6. The Common Carrier Bureau has reviewed TRT/FTC's petitions, Graphnet's Transmittals 185 and 188, and its replies to TRT/FTC's petitions. We conclude that no compelling argument has been presented that the tariff revisions as revised by Transmittal 188 are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

7. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate Graphnet, Inc., Tariff F.C.C. No. 5, Transmittal Nos. 185 and 188 filed by TRT/FTC Communications, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — Transmittal Nos. 2012 and 2037

Revisions to Tariff F.C.C. No. 68

ORDER

Adopted: February 27, 1991; Released: February 27, 1991

By the Chief, Common Carrier Bureau:

1. On October 31, 1990, Southwestern Bell Telephone Company (SWB) filed Transmittal 2037, to offer three new protection options for various network segments of its standard DS1 and DS3 fiber optic special access services, collectively called "SecureNet." Transmittal 2037 Description and Justification (D&J) at 1-3.[1] Transmittal 2037 is scheduled to become effective February 28, 1991.

2. SecureNet Options 1, 2, and 3, each applicable to both DS1 and DS3 services, would provide redundancy for service involving hubs, central offices, and loops, respectively. SWB explains that each of these options would provide a geographically distinct "protect" circuit and associated special circuit equipment which would automatically detect failure in the working circuit and restore transmission within two seconds by switching the traffic through a differently routed protect circuit. *Id.* SWB states that, based on its analysis of demand and availability of facilities, it would initially offer all three SecureNet options only in Dallas and Houston, Texas. SWB further states that it would initially offer Option 3 for fiber loops "where facilities exist," but it estimates that demand for this would be only 1 percent of the initial total demand. *Id.* at 3.

3. Metropolitan Fiber Services, Inc. (MFS) has filed a petition to reject or to suspend and investigate Transmittal 2037 on the grounds, *inter alia*, that its limitation to Dallas and Houston is geographically discriminatory, that the purported basis for this limitation is contradicted by other SWB representations to the Commission, that some of the terms in the transmittal are unacceptably vague, and that SWB's rates are strategically set below costs. MFS Petition at 3-5; 6-7. MCI Telecommunications Corporation (MCI) has filed a petition to suspend and investigate Transmittal 2037 on the grounds that the rates are unlawful. MCI Petition at 1-2. MCI characterizes the rates and rate structure as strategic and at a premium above fully distributed costs (FDC). *Id.* at 3-5.[2]

4. In its reply, SWB disputes MFS's claims by clarifying the difference between SecureNet and two "diversely routed," end-to-end DS1 and DS3 facilities. SecureNet, SWB states, with its one differently routed protect line, simply requires less costly facilities than two diversely routed DS1 or DS3 lines. SWB Reply at 4-7. Accordingly, SWB concludes, there is no discount and MFS's argument that SecureNet is predatorily underpriced is invalid. *Id.* at 15-16. SWB replies to MFS's discrimination argument regarding the initial limitation to Dallas and Houston by asserting that it was primarily demographics, rather than anti-competitiveness, that drove SWB to begin deployment there rather than elsewhere. *Id.* at 8-10. In response to MCI's contentions that SecureNet options are greatly overpriced, SWB first notes that the *Strategic Pricing Reconsideration Order* recognizes a role for non-cost factors.[3] SWB then states that, contrary to MCI's claim that SWB has priced SecureNet above FDC, SWB has in fact used an incremental cost method. *Id.* at 16-17.

5. The Common Carrier Bureau has reviewed Transmittal 2037, the description and justification describing it, and the pleadings. We conclude that no compelling argument has been presented that the tariff revisions filed by SWB are patently unlawful and thus warrant rejection, or that suspension and investigation are warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject or to suspend and investigate Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Transmittal No. 2037 filed by Metropolitan Fiber Systems, Inc., and the petition to suspend and investigate that transmittal filed by MCI Telecommunications Corporation ARE DENIED.

7. IT IS FURTHER ORDERED that the petition to reject or to suspend Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Transmittal No. 2012 filed by US Sprint Communications Company Limited Partnership, the petition to reject Transmittal No. 2012 filed by MCI Telecommunications Company, and the petition to reject or suspend that transmittal filed by Metropolitan Fiber Systems, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] In Transmittal 2012, filed on July 27, 1990, SWB previously presented the same general regulations for SecureNet service. The ICB pricing structure of Transmittal 2012 was subsequently withdrawn, but the remaining provisions of Transmittal 2012, *i.e.*, the general service regulations, were not withdrawn. Transmittal 2012 is also scheduled to become effective February 28, 1991.

[2] Petitions against Southwestern Bell Transmittal 2012 were filed by US Sprint Communications Company Limited Partnership, MCI, and MFS. Most of the arguments made in these petitions were directed to the ICB pricing structure, which has since been replaced by a general rate structure for SecureNet, and are therefore moot. Arguments made regarding the general regulations for SecureNet were again made with respect to Transmittal 2037 and are not separately summarized in this Order.

[3] SWB Reply at 5, *citing* Investigation of Special Access Tariffs of Local Exchange Carriers, Order on Reconsideration, 5 FCC Rcd at 403 (1990) (*Strategic Pricing Reconsideration Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 2760

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: March 1, 1991; Released: March 1, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 2760 to introduce Virtual Telecommunications Network Service (VTNS) Option 81 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations.

2. US Sprint Communications Company Limited Partnership (Sprint), MCI Telecommunications Corp. (MCI), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Option 81 on December 18, 1990. AT&T filed a reply on December 21, 1990.

3. Sprint contends that Option 81 raises the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand* [1] and must be reviewed in light of the remand. Sprint Petition at 1-2; *see also* MCI Petition at 2-3; Williams Petition at 2; CompTel Petition at 3. Sprint argues that AT&T has failed to demonstrate that Option 81 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between Option 81 and AT&T's other services. Sprint Petition at 6-8; *see also* MCI Petition at 3-5; Williams Petition at 6-13; CompTel Petition at 4. Sprint further contends that even if Option 81 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and thus are discriminatory. Sprint Petition at 8-9. Sprint also argues that Option 81 impermissibly bundles 800 Service with SDN Service for the application of the Domestic Usage Volume Pricing Plan in violation of Section 201(b) of the Communications Act. Sprint Petition at 10-11; *see also* MCI Petition at 4; Williams Petition at 21-22; CompTel Petition at 6-7 (also alleging that AT&T is unlawfully leveraging its market power in international services).

4. MCI charges that AT&T has not provided adequate cost support as required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, to justify the price differences between Option 81 and its component services available under standard AT&T tariffs. MCI also contends that the Commission must review the underlying contracts to determine reliably whether price differences between Option 81 and other Tariff 12 options are justified. MCI Petition at 5 & 5 n.6. Williams argues that Tariff 12 options are not generally available and that AT&T's cost support is inadequate. Williams Petition at 16-19; *see also* CompTel Petition at 4 n.2, 7-9. Williams also claims that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. Williams Petition at 19-20. Williams further contends that the Commission should adopt, or require AT&T to adopt, safeguards to remedy any unlawful discrimination that will occur if Option 81 takes effect. *Id.* at 24-25. Williams also alleges that if Tariff 12 is found to be a system of unlawful preferences, Tariff 12 customers could be liable to the Federal Government for treble the value of the preference under Section 503(a) of the Communications Act, 47 U.S.C. § 503(a). *Id.* at 14-15.

5. AT&T replies that the *Tariff 12 Remand* did not call into question the lawfulness of Tariff 12, but rather remanded on the "technical ground" that the Commission had not "turn[ed] square corners of administrative law" in terminating the investigation of the initial options. AT&T Reply at 4-7. AT&T also denies that Option 81 unlawfully leverages AT&T's alleged advantage in international services into other markets. *Id.* at 9 n.*.

6. In addition, AT&T contends that there is no unreasonable discrimination between the rates in Option 81 and rates in other VTNS options. *Id.* at 12-14. AT&T also asserts that Tariff 12 options are generally available and claims that a number of options have multiple, unaffiliated customers. *Id.* at 12 n.**. AT&T finally contends that Section 503(a) of the Communications Act is facially inapplicable to Tariff 12 filings because it deals with a "rebate" of tariffed charges and every Tariff 12 customer pays charges precisely as specified in the tariff. *Id.* at 20-22.

7. The Common Carrier Bureau has reviewed AT&T Transmittal No. 2760, the petitions filed by Sprint, MCI, Williams, and CompTel, and related pleadings. We conclude that no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection.

8. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although this transmittal does not present new questions that warrant investigation at this time, it could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal No. 2760 takes effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

9. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2760 filed by US Sprint Communications Company Limited Partnership, MCI Telecommunications Corp., Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE DENIED.

10. IT IS FURTHER ORDERED that Transmittal No. 2760 takes effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990) (*Tariff 12 Remand*).

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